Supreme Court, U.S.
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No. 05-____

In The
Supreme Court of the United States

JOHN SALAZAR, as the Sheriff
of Huerfano County, Colorado,

Petitioner,

v.

TEREZA GONZALES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

DAVID R. BROUGHAM*
ANDREW D. RINGEL
HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202-2052
(303) 628-3300
*Attorneys for Petitioner
John Salazar as the Sheriff
of Huerfano County, Colorado*

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May a sheriff be held individually and personally liable pursuant to 42 U.S.C. § 1983 based on his failure to protect an inmate from a sexual assault by an employee of the jail in the absence of any actual or constructive knowledge the employee posed any risk to the health, safety and well-being of the inmates in the jail?

LIST OF PARTIES TO THE PROCEEDING

1. Tereza Gonzales, respondent
2. Robert Martinez
3. Dominick Gonzales
4. Huerfano County, Colorado
5. John Salazar, Sheriff of Huerfano County, petitioner

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
STATEMENT OF RELATED CASES	6
REASONS FOR GRANTING THE WRIT	6
I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT'S DECISION FAILS TO FOLLOW DECISIONS FROM THE COURT	6
A. The Court of Appeals' Decision Conflicts With Precedent From the Court in Concluding Sheriff Salazar Could be Deliberately Indifferent to Ms. Gonzales' Eighth Amendment Constitutional Rights Without Any Prior Knowledge That Robert Martinez Posed Any Danger to Any Inmates in the Huerfano County Jail Including Ms. Gonzales	7

TABLE OF CONTENTS – Continued

Page

B. The Court of Appeals' Decision Also Conflicts With the Court's Precedent in Failing to Recognize and Correctly Apply the Causation Requirement for 42 U.S.C. § 1983 Cases in Holding Ms. Gonzales Stated a Viable Claim Concerning Sheriff Salazar's Deliberate Indifference to Her Constitutional Rights Based on Conduct by Mr. Martinez 16

II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL 21

III. THE PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE, IN THAT THE RESULT, IF UNDISTURBED, WILL LEAD TO SIGNIFICANT LIABILITY FOR ADMINISTRATORS AND WARDENS OF JAILS AND PRISONS THROUGHOUT THE UNITED STATES PURSUANT TO 42 U.S.C. § 1983 BASED ON NO ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF PRIOR SEXUAL MISCONDUCT BY INDIVIDUALS UNDER THEIR SUPERVISION SO LONG AS ANY PRIOR INCIDENT OF SEXUAL MISCONDUCT BY ANY EMPLOYEE OF THE JAIL OR PRISON WITH INMATES HAS PREVIOUSLY OCCURRED 28

CONCLUSION 30

TABLE OF CONTENTS – Continued

Page

APPENDICES:

Court of Appeals Opinion: Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. Apr. 14, 2005).....App. 1

District Court Order Granting Motion for Summary Judgment (May 7, 2003).....App. 17

Recommendation that Motion for Summary Judgment Filed by Sheriff and County in Regard to Claims of Tereza Gonzales be Granted (Feb. 20, 2003).....App. 20

Court of Appeals Order Denying Petition for Rehearing and Rehearing En Banc (June 6, 2005).....App. 57

Reporter's Transcript, Hearing on Motion for Summary Judgment (Apr. 30, 2003).....App. 58

Deposition of John G. Salazar (May 2, 2000).....App. 84

Deposition of Tereza M. Gonzales (May 3, 2000).....App. 131

Affidavit of John Salazar.....App. 140

Information Re: People of State of Colorado against Robert Conrad Martinez.....App. 142

Judgment of Conviction in People of State of Colorado v. Tereza Gonzales.....App. 144

Deposition of Paul J. Zudar (Nov. 29, 2000).....App. 146

Deposition of Charles L. Montoya (Nov. 29, 2000).....App. 185

Deposition of Amanda Guel (Dec. 6, 2000).....App. 222

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arnold v. International Business Machines Corp., 637 F.2d 1350 (9th Cir. 1981) 19

Baucher v. Eastern Indiana Prod. Credit Associate, 906 F.2d 332 (7th Cir. 1990) 19

Baynard v. Malone, 268 F.3d 228 (4th Cir. 2001), *cert. denied*, 535 U.S. 954 (2002) 18

Beers-Capitol v. Whetzel, 256 F.3d 120 (3rd Cir. 2001) 22, 23, 25

Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997) ..... *passim*

Crawford-El v. Britton, 523 U.S. 574 (1998) 18

Curry v. Scott, 249 F.3d 493 (6th Cir. 2001) 23, 24, 25

Estate of Davis v. City of North Richland Hills, 406 F.3d 375 (5th Cir. 2005) 18

Dimarco-Zappa v. Cabanillas, 238 F.3d 25 (1st Cir. 2001) 18

Dixon v. Burke County, Georgia, 303 F.3d 1271 (11th Cir. 2002) 19

Farmer v. Brennan, 511 U.S. 825 (1994) ..... *passim*

Gebser v. Lago Vista Ind. Sch. District, 524 U.S. 274 (1998) 11

Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005) 1

Gossmeyer v. McDonald, 128 F.3d 481 (7th Cir. 1997) 18

TABLE OF AUTHORITIES – Continued

Page

Hahn v. McLey, 737 F.2d 771 (8th Cir. 1984) 18

Hector v. Watt, 235 F.3d 154 (3rd Cir. 2000) 19

Helling v. McKinney, 509 U.S. 25 (1993) 13

Hernandez v. Keane, 341 F.3d 137 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 971 (2005) 18

Hovater v. Robinson, 1 F.3d 1063 (10th Cir. 1993) 4

International Action Center v. United States, 365 F.3d 20 (D.C. Cir. 2004) 18, 27

Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) 18

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 17

Lopez v. Lemaster, 172 F.3d 756 (10th Cir. 1999) 4

Monell v. Department of Social Services, 436 U.S. 658 (1978) 18

Muhammad v. Close, 379 F.3d 413 (6th Cir. 2004) 19

Poe v. Leonard, 282 F.3d 123 (2d Cir. 2002) 24, 25

Polk County v. Dodson, 454 U.S. 312 (1981) 17

Randall v. Prince George's County, Maryland, 302 F.3d 188 (4th Cir. 2002) 27

Riley v. Olk-Long, 282 F.3d 592 (8th Cir. 2002) 21, 22, 25

Rizzo v. Goode, 423 U.S. 362 (1976) 18, 27

Rodriguez-Cirilo v. Garcia, 115 F.3d 50 (1st Cir. 1997) 18

Scott v. Hern, 216 F.3d 897 (10th Cir. 2000) 19

TABLE OF AUTHORITIES – Continued

Page

Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994) 26, 27

Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984) 27

Warth v. Seldin, 422 U.S. 490 (1975) 18

Worrell v. Henry, 219 F.3d 1197 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) 18

Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) 18

UNITED STATES CONSTITUTION

U.S. Const. Amend VIII 1, 9

FEDERAL STATUTES

20 U.S.C. §§ 1681 et seq. 11

28 U.S.C. § 636(b) 4

28 U.S.C. § 1254 1

28 U.S.C. § 2101(c) 1

42 U.S.C. § 1983 ..... *passim*

Fed. R. Civ. P. 72(b) 4

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 13.3 1

OPINIONS BELOW

The decision of the United States Court of Appeals has been published at 403 F.3d 1179. App. 1. The decision of the United States District Court for the District of Colorado was not published. App. 17. The Recommendation of the United States Magistrate Judge was also not published. App. 20.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on April 14, 2005. App. 1. Petitioner John Salazar filed a Motion for Extension of Time to File Petition for Rehearing on April 28, 2005, which as granted by the United States Court of Appeals for the Tenth Circuit on May 10, 2005, requesting until May 20, 2005. On May 20, 2005, Petitioner John Salazar filed a Petition for Rehearing En Banc. The United States Court of Appeals for the Tenth Circuit denied the Petition for Rehearing En Banc in an Order dated June 6, 2005. App. 57. The Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. § 1254, 28 U.S.C. § 2101(c), and Rule 13.3 of the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves 42 U.S.C. § 1983:

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Tereza Gonzales was an inmate in custody at the Huerfano County Jail. John Salazar was the elected Sheriff of Huerfano County. Robert Martinez and Dominick Gonzales were both Detention Officers who worked in the Huerfano County Jail.

Ms. Gonzales alleges she was sexually assaulted by Mr. Martinez on October 13, 1998. Mr. Martinez was the Jail Administrator of the Huerfano County Jail at that time, and held the rank of Major. On the afternoon of October 13, 1998, Mr. Martinez removed Ms. Gonzales from the women's detention area and took her to the

commissary in the jail. Once in the commissary, Mr. Martinez compelled Ms. Gonzales to submit to his sexual actions, including his fondling of Ms. Gonzales' breasts and genital area, and including the performance by Mr. Martinez of oral sex upon Ms. Gonzales. As a result of the incident involving Ms. Gonzales, on October 15, 1998, Mr. Martinez was terminated from his employment, and was subsequently charged and convicted of felonious sexual assault.

Ms. Gonzales filed this lawsuit on June 18, 1999, alleging *inter alia* Sheriff Salazar violated her constitutional rights pursuant to 42 U.S.C. § 1983 by failing to prevent Mr. Martinez's sexual assault of her during her incarceration at the Huerfano County Jail. Sheriff Salazar filed a Motion for Summary Judgment. On February 20, 2003, United States Magistrate Judge O. Edward Schlatter issued a Recommendation that Motion for Summary Judgment Filed by Sheriff and County in Regard to Claims of Tereza Gonzales by Granted. App. 20. In pertinent part, the Magistrate Judge analyzed t' lack of evidence Sheriff Salazar knew of any misconduct by Mr. Martinez prior to October 13, 1998, as follows:

> With minor exceptions, none of the incidents listed by plaintiff makes any reference at all to any serious misconduct by Martinez. Instead, plaintiff describes a history of misconduct by other deputies, including deputy Gonzales. Plaintiff has presented absolutely no evidence to support an inference that Martinez posed a substantial risk of harm, or even ***any*** risk of harm, to female inmates.
>
> In the absence of any evidence of incidents that might reflect that Martinez posed a risk of

> harm to female inmates, plaintiff argues that "[i]t makes no sense to say that Salazar's deliberate indifference must be tied specifically to acts of Martinez of which Salazar was aware. It is the atmosphere at the jail which created the substantial risk of harm to female prisoners, and which is the keystone to liability." *Id.* at 24. Plaintiff is mistaken in this assertion. Plaintiff was harmed by Martinez on October 13, 1997 (sic). In order for Plaintiff to prove that Salazar was deliberately indifferent to the potential for that event, plaintiff must present evidence that would establish that Salazar had knowledge of facts that would lead to an inference that Martinez, not other deputies, presented a "substantial risk of harm." *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993); *Lopez v. Lemaster*, 172 F.3d at 761. Plaintiff has presented no such evidence.

App. 36-37 (emphasis in original).

Ms. Gonzales objected to the Magistrate Judge's Recommendation pursuant to 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b). United States District Court Judge Daniel B. Sparr, in an Order dated May 7, 2003, accepted the Magistrate Judge's Recommendation. App. 17. The District Court's May 7, 2003, Order incorporated by reference its conclusions of law made in open court on April 30, 2003. App. 17-18. The District Court reviewed the incidents relied upon by Ms. Gonzales and concluded that they did not demonstrate that Sheriff Salazar possessed any knowledge prior to October 13, 1998, that Mr. Martinez posed a danger to any female inmate incarcerated at the Huerfano County Jail. App. 64-73. In pertinent part, the District Court concluded:

The record should also clearly reflect this man had been a – had had an apparently relatively unspotted, unscathed record for a period of approximately eighteen, nineteen years, as an employee of this department. He had had a couple of small incidents as referred to here, speaking now of Mr. Martinez, but nothing to give any indication that he had ny possible type of prejudice toward females or intent to bother female inmates.

. . . .

Um, and the magistrate observed, as do I, that none of the incidents here made any reference whatsoever to any misconduct by Mr. Martinez. The plaintiff presented absolutely no evidence, according to the magistrate, to support an inference that Martinez posed a substantial risk or even any risk of harm to female inmates. Quite to the contrary, based on the comments by Ms. Noga, it would appear to the contrary.

The magistrate observed that the plaintiff is asserting that there was an atmosphere in the jail which created a substantial risk of harm to female prisoners, and that is the keystone of her claim to liability here.

Magistrate observes, and I agree, that the plaintiff's assertion is misapplied and mistaken. In order for the plaintiff to prove that Salazar was involved or was viable here, there must be a showing of deliberate indifference to the potential for the event alleged in this claim.

App. 66-67.

On August 6, 2003, Ms. Gonzales filed her Notice of Appeal to appeal the District Court's grant of summary

judgment in favor of Sheriff Salazar to the United States Court of Appeals for the Tenth Circuit. The United States Court of Appeals for the Tenth Circuit, in an Opinion dated April 14, 2005, reversed the District Court's grant of summary judgment. App. 1.

STATEMENT OF RELATED CASES

There are no related cases.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT'S DECISION FAILS TO FOLLOW DECISIONS FROM THE COURT

The Court of Appeals' decision fails to follow decisions from the Court in two respects. First, the Court of Appeals' determination conflicts with precedent from the Court by concluding Sheriff Salazar was deliberately indifferent to Ms. Gonzales' Eighth Amendment constitutional rights based on absolutely no evidence Sheriff Salazar possessed even constructive knowledge that Mr. Martinez, the perpetrator of the sexual assault on Ms. Gonzales, posed any danger to any of the inmates at the Huerfano County Jail. Absent even constructive knowledge Mr. Martinez posed a danger to the inmate population, Sheriff Salazar could not have formed the subjective intent necessary to demonstrate he was deliberately indifferent to Ms. Gonzales' constitutional rights. Second, the Court of Appeals' opinion also fails to follow the Court's application of causation principles for 42 U.S.C. § 1983 cases. To meet

the causation requirement, there must be evidence establishing a causal connection between Sheriff Salazar's alleged inadequate decision to retain Mr. Martinez as an employee working at the Jail and the particular injury alleged by Ms. Gonzales. The Court of Appeals' decision fails to address or apply any causation inquiry in this case.

A. The Court of Appeals' Decision Conflicts With Precedent From the Court in Concluding Sheriff Salazar Could be Deliberately Indifferent to Ms. Gonzales' Eighth Amendment Constitutional Rights Without Any Prior Knowledge That Robert Martinez Posed Any Danger to Any Inmates in the Huerfano County Jail Including Ms. Gonzales

The Court of Appeals' determination sufficient evidence existed to create a triable issue concerning whether Sheriff Salazar was deliberately indifferent to Ms. Gonzales' constitutional rights conflicts with the Court's opinion in ***Farmer v. Brennan***, 511 U.S. 825 (1994). The Court of Appeals made its determination, not based on any evidence Sheriff Salazar knew Mr. Martinez, the individual who sexually assaulted Ms. Gonzales on October 13, 1998, posed any danger to any inmate at the Huerfano County Jail. Instead, the Court of Appeals reached its conclusion based on incidents involving individuals working at the Huerfano County Jail other than Mr. Martinez. In so doing, the Court of Appeals misapplied the Court's subjective test outlined in ***Farmer***. The Court of Appeals allowed Ms. Gonzales' claims against Sheriff Salazar to proceed in the absence of any facts establishing Sheriff Salazar possessed either actual or constructive knowledge

that Mr. Martinez posed a danger to any inmates in the Huerfano County Jail including Ms. Gonzales.

The Court of Appeals concluded the following factual allegations taken in the light most favorable to Ms. Gonzales supported a potential finding of deliberate indifference on Sheriff Salazar's part: (1) Sheriff Salazar's failure to conduct any employee performance evaluations since 1994, App. 7; (2) Sheriff Salazar only occasionally visited the Jail, App. 7; (3) Sheriff Salazar delegated investigation of all problems in the Jail to Sergeant Paul Zuder, App. 7; (4) an incident on August 7, 1997, where inmate Brent Maldonado alleged he was beaten up in C-Pod by fellow inmates who were drinking vodka when Dominick Gonzales was in the control room and failed to respond, App. 7; (5) an incident report dated August 10, 1997, submitted by Detention Officer Ruiz stating he saw inmates in C-Pod sitting in the control room with bloodshot eyes, App. 7; (6) a report to Sergeant Montoya on October 14, 1997, that Dominick Gonzales entered the women's pod and exposed himself to inmates, App. 8; (7) a complaint sometime in 1997 from inmate Stella Nora concerning sexual and drug-related activities in the Jail and her inability to obtain prescription drugs during her incarceration, App. 8-9; (8) an arrest of Dominick Gonzales on October 16, 1997, by the police based on his hostility and combative behavior involving harassing female dancers at a bar in Pueblo, Colorado, App. 9; (9) an incident report from an inmate indicating Dominick Gonzales punched him after he had been restrained by other officers and left alone with Mr. Gonzales, App. 9-10; and (10) a letter in April 1998 from inmate Denise Tefteller to Sheriff Salazar describing Dominick Gonzales' "mercurial temperament and arbitrary system of rewards and punishments based on his

mood." App. 10. Review of the Court of Appeals' opinion in its entirety demonstrates that none of the allegations of inappropriate behavior or conduct at the Huerfano County Jail prior to October 13, 1998, involved Mr. Martinez. The majority of them involved Dominick Gonzales and the remainder involved allegations of a general lack of supervision and oversight of the Huerfano County Jail by Sheriff Salazar. App. 1-16.[1]

The Court of Appeals' decision failed to acknowledge and apply precedent from the Court holding a supervisory official, such as Sheriff Salazar, may only be held individually liable pursuant to 42 U.S.C. § 1983 for violations of the Eighth Amendment for failing to protect an inmate from harm by others if the supervisor was subjectively deliberately indifferent to the safety of the inmate. In ***Farmer***, the Court framed the applicable inquiry as follows:

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a

[1] Sheriff Salazar believes the Court of Appeals' recitation of some of these facts is not supported by the record. However, for purposes of the Court's determining whether to grant the instant Petition, even based on the Court of Appeals' facts, Sheriff Salazar cannot be considered to have been deliberately indifferent to Ms. Gonzales' Eighth Amendment constitutional rights as a matter of law. Sheriff Salazar invites this Court to review the actual deposition testimony and other documentary evidence contained in the record before the District Court to make its own conclusions on these facts, if necessary. *See* App. 84-226.

> substantial risk of serious harm exists, and he must also draw the inference.

Farmer, 511 U.S. at 837.

Application of *Farmer's* subjective test here demonstrates Sheriff Salazar had no subjective knowledge Mr. Martinez posed a substantial risk of sexually assaulting or otherwise harming any inmate in the Huerfano County Jail including Ms. Gonzales. The Court of Appeals never addresses nor answers the fundamental question of how Sheriff Salazar subjectively formed the intent to be deliberately indifferent to Ms. Gonzales' safety during her incarceration based on the prospect Mr. Martinez would sexually assault her. No evidence anywhere in the record indicates any inmate or other Huerfano County Jail staff ever complained about any behavior by Mr. Martinez. None of the ten incidents relied upon by the Court of Appeals cited above provides any basis for concluding Sheriff Salazar possessed the subjective knowledge that Mr. Martinez posed a danger to any Huerfano County Jail inmate. Faced with absolutely no actual or constructive knowledge Mr. Martinez had any propensity to sexually assault or otherwise engage in any sexually inappropriate behavior toward inmates at the Huerfano County Jail, Sheriff Salazar had no basis for concluding Mr. Martinez posed any risk to inmates and therefore could not have possessed the requisite subjective intent under *Farmer* to be deliberately indifferent to Ms. Gonzales or the other inmates at the Huerfano County Jail by allowing Mr. Martinez to continue to work at the Jail. To hold Sheriff Salazar liable under Ms. Gonzales' 42 U.S.C. § 1983 theory, Ms. Gonzales must present evidence establishing Sheriff Salazar knew or should have known of the risk posed to inmates by Mr. Martinez and affirmatively chose

to disregard that risk in allowing Mr. Martinez to continue to work at the Huerfano County Jail.[3]

The Court of Appeals' opinion attempts to create subjective intent on behalf of Sheriff Salazar to satisfy ***Farmer*** based on Sheriff Salazar's alleged knowledge of other incidents involving Dominick Gonzales and others. No doubt exists one could conclude Sheriff Salazar either knew or should have known Dominick Gonzales posed a potential threat to female inmates in the Huerfano County Jail based on the prior allegations against Dominick

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[3] The Court, in the context of addressing the scope of the implied cause of action and remedy under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., made the point that liability of a school district for sexual harassment of a student by a teacher was only appropriate when an actual decision to do nothing about prior complaints about the teacher was made by appropriate school district officials. The Court, in analogizing to cases pursuant to 42 U.S.C. § 1983 implies a similar standard would exist in the instant context as well.

> The premise, in other words, is an official decision by a recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions. Considerable considerations led to our adoption of a deliberate indifference standard for claims under § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation.

Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 292 (1998). Here, under the Court of Appeals' rubric, Sheriff Salazar is being held liable to Ms. Gonzales not for his own independent actions or omissions violative of her constitutional rights, but for the actions of his subordinate Mr. Martinez. The only basis to conclude Sheriff Salazar's actions violated Ms. Gonzales' constitutional rights is based on prior knowledge by Sheriff Salazar of a propensity for similar conduct by Mr. Martinez and his failure to act on that knowledge before Mr. Martinez was able to violate Ms. Gonzales' constitutional rights. The Court's logic in ***Gebser*** applies equally here.

Gonzales of inappropriate sexual and other conduct towards inmates. However, simply because Dominick Gonzales may have posed a threat, of sexual misconduct to Ms. Gonzales and other female inmates at the Huerfano County Jail does not equate to evidence that Mr. Martinez, the individual who actually sexually assaulted Ms. Gonzales, posed the identical threat, and Sheriff Salazar was therefore deliberately indifferent to Ms. Gonzales' well-being and constitutional rights by continuing to allow Mr. Martinez to work at the Jail. Under the Court of Appeals' analysis, as long as a prison or jail supervisor possesses actual or constructive knowledge that one staff member may have a propensity for engaging in sexually inappropriate conduct with inmates, if another staff member sexually assaults an inmate, the supervisor may be held individually liable pursuant to 42 U.S.C. § 1983 even if the supervisor had absolutely no knowledge the staff member who actually sexually assaulted the inmate posed any danger whatsoever. The Court of Appeals' questionable "guilt by association" logic has no place in determining the subjective knowledge and intent of a jail supervisor facing individual liability under 42 U.S.C. § 1983. To form the requisite subjective intent under ***Farmer***, there must be evidence demonstrating some knowledge by Sheriff Salazar that Mr. Martinez, and not Dominick Gonzales or the general atmosphere in the Huerfano County Jail, posed a threat to the health and safety of the female inmate population.

The Court of Appeals also criticized the District Court and the Magistrate Judge for concluding applicable precedent required Sheriff Salazar possess specific knowledge Mr. Martinez posed a substantial risk of harm to Ms. Gonzales. App. 15. The Court of Appeals relied upon ***Farmer*** for the proposition a prison official could be

deliberately indifferent to the constitutional rights of a prisoner without knowledge a specific prisoner was likely to assault a specific fellow inmate. App. 15. The Court of Appeals' reliance on *Farmer* is misplaced and takes the Court's statement in that decision entirely out of its appropriate context. In *Farmer*, the inmate sued various federal prison officials for failing to prevent harm to the inmate, who was a "transsexual who projects feminine characteristics," by housing him in a male federal penitentiary and allowing him to be assaulted by other inmates. *Farmer*, 511 U.S. at 830-31. In analyzing the subjective deliberate indifference requirement, the Court in *Farmer* opined as follows:

> Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk or serious damage to his future health," *Helling*, 509 U.S. at 35, and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.

Farmer, 511 U.S. at 843. The point of the Court's statement in *Farmer* is that a prison official could be considered to be deliberately indifferent if an individual inmate who might legitimately be a victim of predatory behavior from other inmates was not protected from the inmate

population as a whole or specific classes of inmates who might attack the inmate in question. Nothing about the Court's discussion in ***Farmer***, however, stands for the remarkable proposition advanced by the Court of Appeals that a prison official may be held personally liable pursuant to 42 U.S.C. § 1983 based on general evidence that other prison officials may pose a danger to an inmate or inmates generally, but no evidence that the specific prison official who actually harmed the inmate posed any such danger. While it is logical to assume that a transsexual inmate with feminine characteristics might face danger from a variety of inmates in a federal penitentiary as the Court did in ***Farmer***, it is not logical to opine that simply because one prison official engaged in sexual improprieties of a non-assaultive nature that an all together different prison official posed a risk of sexually assaulting female inmates.

Instead of the approach adopted by the Court of Appeals, the correct analysis compelled by ***Farmer*** is a determination of whether Sheriff Salazar knew or should have known that Robert Martinez – not Dominick Gonzales or anyone else working at the Huerfano County Jail – posed a substantial risk of harm to Ms. Gonzales or other inmates of sexual assault or otherwise. Absent even constructive knowledge by Sheriff Salazar that Mr. Martinez posed a potential danger to inmates of the Huerfano County Jail, no basis exists for the Court of Appeals' conclusion Sheriff Salazar possessed the requisite subjective intent necessary to rise to the threshold of deliberate indifference under the ***Farmer*** Eighth Amendment standard. Unless Sheriff Salazar had some basis for knowing Mr. Martinez posed a risk to the inmates in the Jail, he simply could not have subjectively perceived a risk

to those inmates from Mr. Martinez, and affirmatively ignored that known risk to inmates by allowing Mr. Martinez to continue working in the Jail to form the legal and factual predicate for deliberate indifference.

Ultimately, the basis of the Court of Appeals' analysis and conclusion is revealed by the conclusion that "it may be fairly inferred Sheriff Salazar's purported ignorance of the dangerous conditions in the jail was a direct result of his lackadaisical attitude toward his responsibility to run the institution. An inference of the sheriff's lack of responsiveness can also be drawn from other facts." App. 14. The Court of Appeals' description of Sheriff Salazar's "lackadaisical attitude" and "lack of responsiveness" and all of the facts cited by the Court of Appeals do not amount to Sheriff Salazar being deliberately indifferent to any known danger Mr. Martinez posed to Ms. Gonzales or any other inmate in the Huerfano County Jail. Instead, the Court of Appeals has incorrectly imposed what amounts to a negligence standard on Sheriff Salazar instead of the vigorous proof required to establish deliberate indifference. It is not enough for Sheriff Salazar to have poorly run the Huerfano County Jail or ignored the inappropriate behavior of Dominick Gonzales or other staff of the Jail. Absent any evidence Sheriff Salazar had actual or constructive knowledge Mr. Martinez posed a danger to inmates in the Jail, no basis exists to hold Sheriff Salazar personally liable for Mr. Martinez' sexual assault on Ms. Gonzales on October 13, 1998.

Sheriff Salazar requests the Court review the Court of Appeals' misapplication of ***Farmer's*** subjective standard here to clarify the type of knowledge required of a supervisor to support a claim the supervisor was deliberately indifferent to the health, safety and well-being of inmates

based on the wrongful conduct of one of the supervisor's subordinates. Fundamentally, the problem with the Court of Appeals' analysis and conclusion is that it allows supervisors to be held liable without either actual or constructive knowledge of alleged prior wrongful conduct by the particular subordinate who engaged in the wrongful conduct at issue. Jail and prison supervisors are sued on a daily basis pursuant to 42 U.S.C. § 1983 based on alleged unconstitutional conduct by their subordinates. The implications of the Court of Appeals' analysis and conclusion is that so long as a supervisor knows that one of his subordinates has previously engaged in alleged wrongful conduct in the past, the supervisor may be held individually and personally liable pursuant to 42 U.S.C. § 1983 if another subordinate subsequently engages in alleged wrongful conduct. The Court of Appeals' decision, left unreviewed by the Court, will have profound implications for the potential liability of jail and prison supervisors across the nation.

B. The Court of Appeals' Decision Also Conflicts With the Court's Precedent in Failing to Recognize and Correctly Apply the Causation Requirement for 42 U.S.C. § 1983 Cases in Holding Ms. Gonzales Stated a Viable Claim Concerning Sheriff Salazar's Deliberate Indifference to Her Constitutional Rights Based on Conduct by Robert Martinez

The Court of Appeals' failure to analyze or apply causation principles to Ms. Gonzales' 42 U.S.C. § 1983 claim against Sheriff Salazar conflicts with the Court's decision in ***Board of County Commissioners of Bryan***

County v. Brown, 520 U.S. 397 (1997). In ***Brown***, the Court held in the municipal liability context under 42 U.S.C. § 1983 that the deliberate indifference inquiry must reflect a causal connection between the alleged municipal failure and the particular constitutional or statutory right allegedly violated by the municipality and its agents. ***Brown***, 520 U.S. at 411. The Court of Appeals here never applied any type of causation analysis in determining Sheriff Salazar's liability to Ms. Gonzales based on the conduct of Mr. Martinez. In the absence of actual or constructive knowledge by Sheriff Salazar that Mr. Martinez posed any risk to the health and safety of the inmate population in the Huerfano County Jail, no decision by Sheriff Salazar to continue to employ Mr. Martinez in the Jail caused any injury to Ms. Gonzales based on Mr. Martinez's sexual assault of her. Sheriff Salazar's individual liability to Ms. Gonzales pursuant to 42 U.S.C. § 1983 must be premised on his own acts and omissions respecting the operation of the Huerfano County Jail. Absent any causal link between any decision Sheriff Salazar made respecting Mr. Martinez and Ms. Gonzales' injury, no basis whatsoever exists to hold Sheriff Salazar individually personally liable to Ms. Gonzales for Mr. Martinez' actions not his own. The Court of Appeals' failure to apply basic causation principles assessing Sheriff Salazar's liability results in inappropriately holding Sheriff Salazar liable simply because he had the ultimate responsibility over the Huerfano County Jail. The Court of Appeals' decision results in holding Sheriff Salazar liable based on *respondeat superior* principles, a concept long declared inapplicable in the 42 U.S.C. § 1983 context by the Court. *See, e.g.*, ***Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit***, 507 U.S. 163, 166 (1993); ***Polk***

County v. Dodson, 454 U.S. 312, 325 (1981); *Monell v. Dept. of Social Services*, 436 U.S. 658, 691 (1978).[3]

Causation is a requirement to state a viable 42 U.S.C. § 1983 claim. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Thus, the court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment."); *Warth v. Seldin*, 422 U.S. 490, 509 (1975) ("Apart from the conjectural nature of the asserted injury, the line of causation between Penfield's actions and such injury is not apparent from the complaint."); 42 U.S.C. § 1983 ("Every person who . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . shall be liable").[4] In

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[3] The Court has not specifically held that *respondeat superior* principles cannot form the basis of supervisory liability under 42 U.S.C. § 1983, although the Court's decision in *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), does so by implication. However, the Circuit Courts of Appeal have explicitly done so. *See, e.g., International Action Center v. United States*, 365 F.3d 20, 27 (D.C. Cir. 2004); *Dimarco-Zappa v. Cabanillas*, 238 F.3d 25, 33 n. 10 (1st Cir. 2001); *Hernandez v. Keane*, 341 F.3d 137, 144-45 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 971 (2005); *Baynard v. Malone*, 268 F.3d 228, 235 (4th Cir. 2001), *cert. denied*, 535 U.S. 954 (2002); *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 380-81 (5th Cir. 2005); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997); *Hahn v. McLey*, 737 F.2d 771, 773 (8th Cir. 1984); *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001).

[4] Although the Court has not explicitly stated causation is a requirement under 42 U.S.C. § 1983 claims, the clear majority of the Circuit Courts of Appeal have done so. *See, e.g., Rodriguez-Cirilo v. Garcia*, 115 F.3d 50, 52 (1st Cir. 1997); *Zahrey v. Coffey*, 221 F.3d 342,

(Continued on following page)

Brown, the Court analyzed issues of municipal liability in terms of causation. The issue in ***Brown*** was whether Bryan County could be held liable based on the alleged failure by the Sheriff to adequately screen a deputy sheriff's background that allegedly caused the deputy sheriff to be hired so that he could use excessive force on the plaintiff. The Court cautioned that "[t]o prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged." ***Brown***, 520 U.S. at 410 (emphasis in original). To test this link, the Court in ***Brown*** analyzed the issue in terms of causation – i.e., whether the alleged inadequacy in screening the deputy sheriff's background caused the alleged injury to the plaintiff from the deputy sheriff's alleged use of excessive force. The Court analyzed the issue as follows:

> In layman's terms, inadequate screening of an applicant's background may reflect "indifference" to the applicant's background. For purposes of a legal inquiry into municipal liability under § 1983, however, that is not the ***relevant*** "indifference." A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular

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349-50 (2d Cir. 2000); ***Hector v. Watt***, 235 F.3d 154, 160-61 (3rd Cir. 2000); ***Muhammad v. Close***, 379 F.3d 413, 417-18 (6th Cir. 2004); ***Baucher v. Eastern Indiana Prod. Credit Assoc.***, 906 F.2d 332, 334 (7th Cir. 1990); ***Arnold v. International Business Machines Corp.***, 637 F.2d 1350, 1355 (9th Cir. 1981); ***Scott v. Hern***, 216 F.3d 897, 911 (10th Cir. 2000); ***Dixon v. Burke County, Georgia***, 303 F.3d 1271, 1275 (11th Cir. 2002).

> constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

Brown, 520 U.S. at 411 (emphasis in original).[5]

Applying the causation inquiry of ***Brown*** here demonstrates concluding Sheriff Salazar was deliberately indifferent to Ms. Gonzales' constitutional rights based on Mr. Martinez' conduct must be predicated on the knowledge Sheriff Salazar possessed concerning Mr. Martinez, and not any other individual working in the Jail. In the terms of ***Brown***, absent at least constructive knowledge by

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[5] Sheriff Salazar recognizes the deliberate indifference inquiry is different for the municipal liability context and the Eighth Amendment substantive standard context. *See* ***Farmer***, 511 U.S. at 840-41 (distinguishing between the two concepts and holding that a subjective standard applied in the Eighth Amendment context). However, the causation analysis from ***Brown*** should be applicable to all 42 U.S.C. § 1983 claims, not simply the municipal liability context where it was specifically developed. Nothing about ***Brown*** limits its causation analysis in such a fashion. Moreover, as this case demonstrates, the same type of theory as was at issue in ***Brown*** – attempting to extend liability beyond the actual violator of the plaintiff's constitutional rights – exists in the context of holding individual supervisors liable pursuant to 42 U.S.C. § 1983. As such, the exact same problem exists of collapsing a supervisor's decision to continue to employ a particular subordinate into *respondeat superior* liability, and the courts must therefore carefully test the causal link between the supervisor's alleged inadequate decision and the particular injury alleged in this context as much as in the municipal liability context. In short, ***Brown's*** analysis should apply here as well.

Sheriff Salazar that Mr. Martinez posed a danger to female inmates in the Huerfano County Jail, Sheriff Salazar did not and could not appreciate or be deliberately indifferent to any risk Mr. Martinez posed to the particular constitutional right of Ms. Gonzales and the other female inmates in the Huerfano County Jail to be free from Mr. Martinez' sexual misconduct. Without at least constructive knowledge of Mr. Martinez' propensity to be a sexual perpetrator, Sheriff Salazar's alleged general failure to oversee the operations of the Jail cannot constitute the cause of any injury to Ms. Gonzales' constitutional rights. Under ***Brown's*** causation inquiry, which the Court of Appeals failed entirely to conduct, Sheriff Salazar cannot have been deliberately indifferent to Ms. Gonzales.

II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL

Sheriff Salazar has been unable to locate any other decision from any of the Courts of Appeal holding an individual supervisor liable pursuant to 42 U.S.C. § 1983 for the misconduct of the supervisor's subordinates absent actual or at least constructive knowledge by the supervisor of prior misconduct by the subordinate. The Court of Appeals' decision here is an outlier not in concert with decisions of the other Courts of Appeal.

For example, in ***Riley v. Olk-Long***, 282 F.3d 592 (8th Cir. 2002), the Eighth Circuit upheld a jury's liability finding against the warden and the security director of a women's correctional facility based on their deliberate indifference to the fact a correctional officer posed a risk to sexually assault female inmates. In ***Riley***, the correctional

officer "had a history of predatory behavior throughout his employment at the prison." ***Riley***, 282 F.3d at 594. Moreover, the evidence in ***Riley*** was that both the warden and the security director possessed at least some specific knowledge about the correctional officer's prior misconduct. *See, e.g.*, ***Riley***, 282 F.3d at 596 ("We conclude that given her position as prison security director and her admitted awareness that Link was a problem guard, it was reasonable for the jury to find Sebek knew that Link posed a substantial risk of harm to the female inmates at the prison by sexually assaulting them."); ***id.*** ("Despite her concerns and knowledge of the many incidents of Link's sexual misconduct, Olk-Long allowed Link to resume his prison duties, which included inmate contact that ultimately led to the assault on Riley."). The Eighth Circuit's approach in ***Riley*** differs significantly from the Court of Appeals in the instant case. The facts in ***Riley*** demonstrate the individual supervisors had actual knowledge of the correctional officer perpetrator's prior misconduct. Sheriff Salazar possessed no such actual or constructive knowledge about Mr. Martinez prior to his sexual assault of Ms. Gonzales.

Similarly, in ***Beers-Capitol v. Whetzel***, 256 F.3d 120 (3rd Cir. 2001), the Third Circuit addressed a district court's grant of summary judgment in favor of various supervisors based on a claim they were deliberately indifferent to the constitutional rights of two residents of a juvenile detention facility from the sexual assault of a detention employee. The Third Circuit's approach, in contrast to the Court of Appeals here, focused on the actual knowledge each supervisor had respecting any misconduct of the detention employee prior to the sexual assaults of the plaintiffs. *See, e.g.*, ***Whetzel***, 256 F.3d at

137 ("The deliberate indifference standard as set out in ***Farmer*** is a high one, however – requiring actual knowledge or awareness on the part of the defendant . . . "). The Third Circuit carefully differentiated the knowledge about any prior misconduct by the detention employee held by each individual supervisor. This approach led the Third Circuit to conclude that summary judgment was inappropriately granted to one supervisor, but not the other supervisors. The Third Circuit's focus, again, unlike the Court of Appeals here, was on the knowledge of the supervisors of the prior misconduct of the perpetrator of the sexual assaults, not anyone else. *See* ***Whetzel***, 256 F.3d at 141 ("The plaintiffs present fairly substantial evidence of Burley's knowledge or awareness of the excessive risk that Whetzel posed to female residents. Burley testified in a deposition that, while she was at YDC, she had heard general rumors from the residents that Whetzel was having sex with some of the female residents, but she did not investigate those rumors or report them to her supervisors. She did, however, make file notes of these rumors 'to cover my behind, in case it were true.' "); ***Whetzel***, 256 F.3d at 140 ("The plaintiffs have provided evidence that Fletcher was aware of three allegations of abuse by Whetzel, but there is no evidence that Fletcher believed that these allegations were likely to be true, or that the evidence surrounding the allegations was so strong that he must have believed them likely to be true.").

Additionally, in ***Curry v. Scott***, 249 F.3d 493 (6th Cir. 2001), the Sixth Circuit reversed the district court's grant of summary judgment in favor of several supervisory defendants in a 42 U.S.C. § 1983 case involving the allegation the supervisors failed to protect several African-American inmates from a correctional officer who had a

propensity to be abusive and racially hostile toward African-American prisoners. ***Curry***, 249 F.3d at 498. The correctional officer in ***Curry*** had an incredibly checkered history of having numerous complaints filed against him for using racial slurs and inappropriately using force against African-American inmates. ***Curry***, 249 F.3d at 498. Further, a memorandum was in the correctional officer's "disciplinary file from an institutional inspector to warden Collins expressing his belief that, if Scott were not disciplined, someone would likely be hurt as a result of his conduct." ***Curry***, 249 F.3d at 498. The Sixth Circuit in ***Curry*** concluded a genuine issue of material fact existed concerning the individual supervisors' actual knowledge about the correctional officer's propensity to be a danger to inmates. *See, e.g.*, ***Curry***, 249 F.3d at 508 ("Given the substance of Scott's employment record, and the affidavits taken of Scott's fellow employees and supervisors, a question of fact exists as to whether Scott's employment record disclosed that his continued employment posed a substantial risk of serious harm to prison inmates."). Again, unlike the supervisors in ***Curry***, no facts exist demonstrating Sheriff Salazar possessed any knowledge from Mr. Martinez' prior employment background that he posed any risk to any inmates under his control at the Huerfano County Jail.

Further, in ***Poe v. Leonard***, 282 F.3d 123 (2d Cir. 2002), the Second Circuit reversed the district court's refusal to grant summary judgment to a supervisor for failing to prevent his subordinate from surreptitiously videotaping a female co-worker undressing after asking the co-worker to appear in a training video. In ***Poe***, the Second Circuit focused on the knowledge the supervisor actually possessed about the perpetrator of the misconduct. The

individual accused of videotaping his co-worker undressing "had a history of inappropriate or otherwise problematic behavior with female civilians while on duty. Pearl's personnel file contains four separate improper incidents in a seven-year period." ***Poe***, 282 F.3d at 127. Importantly, however, the supervisor was unaware of these prior incidents because he had no opportunity to review his subordinate's personnel file. ***Poe***, 282 F.3d at 127. The Second Circuit concluded that no independent reason existed for the supervisor to have reviewed his subordinate's personnel file prior to when the surreptitious videotaping incident occurred. ***Poe***, 282 F.3d at 142. As a result, because the supervisor did not know of the subordinate's prior sexual misconduct, it could not be considered in determining whether the supervisor was deliberately indifferent by allowing the subordinate to film the training video. *See* ***Poe***, 282 F.3d at 143 ("Because Leonard was unaware of Pearl's troubled past, there is insufficient evidence for us to conclude that, ***based on what Leonard knew about Pearl***, Leonard's failure to review Pearl's personnel file was reckless or deliberately indifferent toward Poe's rights.") (emphasis in original). In ***Poe***, the Second Circuit appropriately focused on the knowledge the supervisor had about the specific employee who was accused of misconduct involving the plaintiff prior to the incident. In sharp contrast, the Court of Appeals here did not analyze Sheriff Salazar's knowledge about any prior misconduct involving Mr. Martinez. Instead, the Court of Appeals discussed a wide array of problems in the Huerfano County Jail involving other detention officers.

Both the underlying facts and the analytical approach of the other Circuit Courts of Appeal in ***Riley***, ***Whetzel***, ***Curry*** and ***Poe*** are markedly different from the Court of

Appeals' analysis here. In the other Circuit Courts of Appeal's decisions, the focus was on the evidence existing from which a reasonable trier of fact could conclude the supervisor had actual or constructive knowledge of prior misconduct by the subordinate employee involved in the present misconduct involving the plaintiff, and failed to take action based on that knowledge to allow the subordinate employee to continue to work under circumstances where the employee was positioned to violate the plaintiff's constitutional rights. Here, none of the evidence relied upon by the Court of Appeals demonstrates any actual or even constructive knowledge by Sheriff Salazar that Mr. Martinez posed a threat of danger to any female inmates in the Huerfano County Jail. All such evidence involved Dominick Gonzales or other correctional officers or circumstances, but had nothing to do with Mr. Martinez. App. 6-11.

Unlike the Court of Appeals here, the Fourth Circuit has developed a standard for 42 U.S.C. § 1983 supervisory liability cases that properly accounts for the Court's teaching in ***Farmer*** and ***Brown***. The Fourth Circuit articulates its standard in the following terms:

> As we enunciated in ***Shaw v. Stroud***, 13 F.3d 791 (4th Cir. 1994), supervisory liability may attach under § 1983 if a plaintiff can establish three elements. These are: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) that there was an affirmative

> causal link between the supervisor's inaction and the particular injury suffered by the plaintiff. ***Id.*** at 799 (citations omitted). Under the first prong of ***Shaw***, the conduct engaged in by the supervisor's subordinates must be pervasive, meaning that the conduct is widespread, or at least has been used on several different occasions. *Id.* Furthermore, in establishing deliberate indifference under ***Shaw's*** second prong, a plaintiff ordinarily . . . cannot satisfy his burden of proof by pointing to a single incident or isolated incidents . . . for a supervisor cannot be expected . . . to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct. ***Slakan v. Porter***, 737 F.2d 368, 373 (4th Cir. 1984). Deliberate indifference, however, may be satisfied by showing a supervisor's continued inaction in the face of documented widespread abuses.

Randall v. Prince George's County, Maryland, 302 F.3d 188, 206 (4th Cir. 2002) (internal quotation marks omitted).[6] Sheriff Salazar respectfully submits that the Fourth Circuit's approach to supervisory liability in 42

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[6] The District of Columbia Circuit has adopted an approach to supervisory liability similar to the Fourth Circuit's approach, albeit without setting forth the particular elements of the claim in the same fashion. *See* ***International Action Center v. United States***, 365 F.3d 20, 27 (D.C. Cir. 2004) ("The district court's analysis failed to link the likelihood of particular constitutional violations to any past transgressions, and failed to link these particular supervisors to those past practices or any familiarity with them. In the absence of any such 'affirmative links,' the supervisors cannot be shown to have the requisite 'direct responsibility' or to have given 'their authorization or approval of such misconduct,' ***Rizzo***, 423 U.S. at 371, 376, and the effort to hold them personally liable fades into *respondeat superior* or vicarious liability, clearly barred under Section 1983.").

U.S.C. § 1983 cases appropriately states the applicable legal principles from the Court. The Court of Appeals' analysis and conclusion here are at odds with the Fourth Circuit's approach as well as the other Circuit Courts of Appeals cited above. As such, the Court should address and resolve this issue to create harmony among the Circuit Courts of Appeal.

III. THE PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE, IN THAT THE RESULT, IF UNDISTURBED, WILL LEAD TO SIGNIFICANT LIABILITY FOR ADMINISTRATORS AND WARDENS OF JAILS AND PRISONS THROUGHOUT THE UNITED STATES PURSUANT TO 42 U.S.C. § 1983 BASED ON NO ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF PRIOR SEXUAL MISCONDUCT BY INDIVIDUALS UNDER THEIR SUPERVISION SO LONG AS ANY PRIOR INCIDENT OF SEXUAL MISCONDUCT BY ANY EMPLOYEE OF THE JAIL OR PRISON WITH INMATES HAS PREVIOUSLY OCCURRED

Tragically, allegations of sexual misconduct by jail and prison officials against inmates is an unfortunately common occurrence in the correctional facilities across the nation. In most instances, victims of such misconduct not only attempt to sue the alleged perpetrator of the sexual misconduct, but also attempt to hold public entities operating the jail or prison and individual supervisors responsible pursuant to 42 U.S.C. § 1983. Limitations established by the Court's Eleventh Amendment and municipal liability jurisprudence provide important safeguards on the ability to hold public entities liable for the deplorable actions of individual sexual perpetrators

who happen to wear uniforms. However, no such safeguards exist to prevent unfettered liability from being imposed on individual supervisors.

The Court has never specifically addressed the appropriate standard for determining individual supervisor liability for claims under 42 U.S.C. § 1983 in the context of alleged wrongdoing by employees under the direction of the supervisor. While it is clear that under the Eighth Amendment, a plaintiff must demonstrate the individual supervisor was deliberately indifferent to her constitutional rights, the exact contours of what deliberate indifference means in this context has not been defined by the Court. The Court's review of the Court of Appeals' decision in this case would assist the lower courts in resolving the important question of the nature and quantum of knowledge that a supervisor must have about the prior conduct of the alleged perpetrator of the constitutional violation before the supervisor may be held individually and personally liable under 42 U.S.C. § 1983.

The Court of Appeals' decision in this case, which holds that an individual supervisor may be held individually liable pursuant to 42 U.S.C. § 1983 without specific actual or even constructive knowledge of any prior misconduct by the employee accused of violating the plaintiff's constitutional rights, represents a grave expansion of the potential liability of all jail and prison supervisors throughout the United States. Given the number of incarcerated individuals and the frequency of allegations of misconduct by prison and jail employees, review by the Court of the Court of Appeals' decision presents a matter of exceptional importance. The implications of the Court of Appeals' decision, without review by the Court, will be profound for all 42 U.S.C. § 1983 cases involving claims

against individual supervisors based on the conduct of their subordinates. Absent clarification by the Court that actual or at least constructive knowledge of prior misconduct by the particular employee involved is necessary to establish supervisor liability, the potential for an increase in both claims and determinations of liability against prison, jail, and other supervisors working for public entities is real.

CONCLUSION

In conclusion, for all of the foregoing reasons, Petitioner John Salazar, Sheriff of Huerfano County, Colorado, respectfully requests that this Court grant his Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

DAVID R. BROUGHAM*
ANDREW D. RINGEL
HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202-2052
(303) 628-3300

Attorneys for Petitioner John Salazar as the Sheriff of Huerfano County, Colorado

**Counsel of Record*

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TEREZA GONZALES, Plaintiff-Appellant, v. ROBERT MARTINEZ; DOMINICK GONZALES; JOHN SALAZAR, as the Sheriff of Huerfano County, Colorado; HUERFANO COUNTY, COLORADO, Defendants-Appellees.	No. 03-1348

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 99-S-1152-OES)

(Filed Apr. 14, 2005)

Raphael M. Solot, (Darol C. Biddle, Pueblo, Colorado with him on the briefs), Denver, Colorado for Plaintiff-Appellant.

David R. Brougham, Hall & Evans, Denver, Colorado for Defendants-Appellees.

Before **SEYMOUR, PORFILIO**, and **HARTZ**, Circuit Judges.

PORFILIO, Senior Circuit Judge.

In *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), the Court decided "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." In this case, the district court concluded plaintiff failed to meet her burden of establishing a constitutional violation by presenting evidence jail officials knew of the substantial risk of physical harm to prisoners in their facility and failed to take reasonable measures to prevent its recurrence. Concluding the record indicates the contrary, we reverse.

I. Background

On the afternoon of October 13, 1998, Robert Martinez (Major Bob), the administrator of the Huerfano County Jail in Walsenburg, Colorado,[1] escorted inmate Tereza Gonzales[2] to the Jail commissary after she requested a comb. Inside the small room, Major Bob used his knife to open a package of combs and then, with the knife in his hand, blade open, told Ms. Gonzales, "Once you're in this room, you belong to me." Major Bob sexually assaulted her.

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[1] In his deposition, Sheriff Salazar stated the jail administrator is in charge of overseeing and monitoring all operations at the Jail, including the control room, booking, security, meals, medical needs, and employee paperwork. Although Martinez held the title, "Major," and was called Major Bob in the Jail, Sheriff Salazar indicated Martinez asked for the title. As jail administrator, Major Bob reported directly to Sheriff Salazar, whose wife is Martinez's niece.

[2] Ms. Gonzales had then served about a week of a 30-day sentence imposed for her failure to appear in court on a pending charge. Except for when she was sent to Fort Logan, Colorado, after her father killed her mother, she had never been incarcerated before.

On the same afternoon, Amanda Guel,[3] another inmate, was summoned to the control room by Dominick Gonzales,[4] the senior detention officer, who sexually assaulted her.

That evening, both women handed written statements describing the assaults to two detention officers who called Huerfano County Sheriff John Salazar. Sheriff Salazar then went to the jail and instructed the officers on duty to tell Ms. Guel and Ms. Gonzales he had been notified and would speak to them the next morning.

Instead, Sheriff Salazar transported Ms. Gonzales to another of her court appearances and learned she had written a second report on the sexual assault, which she did not give him. Sheriff Salazar told her to give the statement to her public defender.

Shortly after her return to the women's pod at the Jail, however, Major Bob, speaking over the intercom, summoned Ms. Gonzales to the control room.[5] There, Major Bob grabbed her arm and stated, "Let's start off where we left off yesterday." Ms. Gonzales told Major Bob "it was bad," but he "pressed his body" against hers and tried to kiss her, before she "pushed [him] away and went back to the pod." During the encounter, she stated he did not "have anything unzipped."

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[3] Ms. Guel filed similar claims against the same parties. After settlement, the district court dismissed her case.

[4] Tereza Gonzales and Dominick Gonzales are not related. However, Dominick Gonzales is Sheriff Salazar's son-in-law. To avoid confusion, Dominick Gonzales will be referred to as "Dominick."

[5] At that time, the control room, the command center for Jail security, housed video cameras to monitor some areas of the Jail.

Although he did not speak with Ms. Gonzales until after the second encounter with Major Bob and another of her court appearances on October 14th, Sheriff Salazar did interview Ms. Guel around 1:00 p.m. that day. Later, he met with Ms. Gonzales and her public defender, who, along with a Deputy District Attorney, instructed her to remain silent.

Soon after, the District Attorney called Sheriff Salazar and told him to release Ms. Guel and Ms. Gonzales immediately. That same afternoon, one of the District Attorney's investigators arrived at the Jail. Following her investigation, Major Bob and Dominick were suspended and later charged with and convicted of the assaults.

Ms. Gonzales filed this action under 42 U.S.C. § 1983, alleging "there were other incidents of sexual assault at the Huerfano County Jail involving Martinez, Gonzales and/or others of which Salazar and Martinez were aware, and that Salazar and Martinez failed to take those steps necessary to assure the safety of the plaintiff." As defendants, she named Sheriff Salazar,[6] Huerfano County,[7]

[6] The Magistrate Judge decided Sheriff Salazar was sued in his individual and personal capacity.

[7] Curiously, neither the district court nor defendants have challenged Ms. Gonzales' designating "Huerfano County" as defendant. Under Colo. Rev. Stat. § 30-11-105, "the name in which the county shall sue or be sued shall be, 'The board of county commissioners of the county of. . . .'" "This statutory provision provides the exclusive method by which jurisdiction over a county can be obtained. An action attempted to be brought under any other designation is a nullity, and no valid judgment can enter in such a case." *Calahan* v. *Jefferson County*, 429 P.2d 301, 302 (Colo. 1967). Were we to overlook this jurisdictional flaw, we are still guided by *Bristol* v. *Bd. of County Comm'rs of Clear Creek*, 312 F.3d 1213, 1215 (10th Cir. 2002) (under the Colorado constitution, the County Sheriff is a distinct position,

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Martinez, and Dominick Gonzales. Ms. Gonzales alleged defendants knew of the danger Major Bob and Dominick posed and failed to protect her in violation of her Eighth Amendment rights.[5] Ms. Gonzales also alleged Huerfano County owed a duty to employ competent law enforcement officers and to supervise their conduct to prevent violations of prisoners' civil rights.

Sheriff Salazar and Huerfano County moved for summary judgment alleging the undisputed facts sustained no constitutional violation and the doctrine of qualified immunity barred any such claim against Sheriff Salazar. The Magistrate Judge recommended granting the motion.

In an oral order from the bench, the district court embraced the Magistrate Judge's order in its entirety, holding that while the sexual assaults were undisputed, Sheriff Salazar's failure to prevent harm to Ms. Gonzales

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separate from the Board of County Commissioners). The only claims Plaintiff made against the County were based on a faulty premise. She asserted the County owed her a duty "to employ competent law enforcement officers and to supervise the conduct of its sheriff and Chief Jail Administrator." That is not a valid premise under Colorado law. *Id.* Had Plaintiff claimed the Sheriff set official policy of the County or was following policy established by the County in the operation of the jail, we might have to reach a different conclusion. See *id.* at 1221 ("counties can be held liable for the misdeeds of Sheriffs and their employees when the Sheriff is held to set 'official policy' for the county."). Yet, whether because of the plain language of the statute or the Plaintiff's failure to state a valid claim, the action cannot lie against Huerfano County.

[5] Her second claim for negligent supervision against Sheriff Salazar and Huerfano County is subsumed within the first. Her third claim for assault and battery against Major Bob and Dominick, was dismissed with prejudice after the district court dismissed the § 1983 and negligent supervision claims.

did not amount to deliberate indifference. In response to prior incidents of sexual misconduct and violence at the Jail, the court summarily concluded without citing any specific evidence, "Sheriff Salazar took appropriate remedial measures at the time" but observed, Sheriff Salazar "was unable to do anything" after the October 13th sexual assaults because Ms. Gonzales "refused to discuss the matter with him on one occasion . . . on two occasions." Ms. Gonzales seeks de novo review of that judgment.

II. Prior Incidents Establishing Notice

To meet the *Farmer* test that Sheriff Salazar knew of and disregarded "an excessive risk to inmate health and safety," 511 U.S. at 837, Ms. Gonzales presented a series of incidents both preceding and following her assault to establish a genuine issue of material fact that the sheriff was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [] must also draw the inference." *Id.* Under this test, "an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm *actually* would befall an inmate; it is enough that the official acted or failed to act *despite his knowledge* of a substantial risk of serious harm." *Id.* at 842 (emphasis added). "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including *inference* from circumstantial evidence." *Id.* (emphasis added). To meet this test, Ms. Gonzales presented a series of incidents at the Jail, which, she contends, cumulatively establishes Sheriff Salazar failed to protect her "despite his knowledge of a substantial risk of harm." *Id.*

First, Ms. Gonzales presented evidence, including Sheriff Salazar's testimony, he had not conducted any employee performance evaluations since 1994, only occasionally visited the jail, and left the investigation of all problems at the jail to his designee, Sergeant Paul Zudar. Second, given this supervisory style, Ms. Gonzales set out a series of specific incidents which occurred from August 1997 to October 1997.

Explaining his response to those events, Sheriff Salazar stated although Major Bo[illegible], the Jail Administrator, "was concerned about the allegations, [] he didn't want to take the step forward to investigate, so I assigned a Sergeant Mike[9] Zudar." In one incident on August 7, 1997, inmate Brent Maldonado alleged he was beaten up in C-pod by fellow inmates who were drinking vodka; Dominick was in the control room and failed to respond to his screams.[10] On August 10, 1997, Detention Officer Ruiz filed an incident report stating he saw inmates from C-pod sitting in the control room. He noted some inmates had bloodshot eyes and appeared to know how to run the controls and "bragged about knowing how to run the controls." The inmates remained in the control room for several hours before returning to their pod. He stated, "I overlooked the situation because I was new to the job and did not know what to do."

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[9] Sheriff Salazar stated "Mike" although the record consistently refers to Sgt. Paul Zudar.

[10] Mr. Maldonado also reported he was beaten again on October 31, 1997, without any intervention by guards. In his deposition, Sheriff Salazar did not remember whether the investigation of these complaints established any fault on Dominick's part but believed Dominick was not disciplined. Mr. Maldonado's attorney apparently did not pursue an initial intent to sue notice.

On October 14, 1997, Sergeant Montoya, a female deputy, received a report that Dominick entered the women's pod and exposed himself to inmates. Documenting their complaints about the event, inmates Rebecca Flecksteiner[11] and Josette Montez separately wrote statements describing a setting of lax security in which Dominick would call female inmates to the meds room and taunt them over the intercom operated in the control room to "show us your tits." Under his control, Ms. Flecksteiner complained Dominick rewarded female inmates for participating or punished them for objecting.[12] Asked about these reports, Sheriff Salazar stated he did not believe them: "[t]he majority of the inmates that we have in our facility would conjure up and work with other inmates to disbelieve – or discredit one officer, because they are strict on rules." When the matter was referred for investigation, Sergeant Zudar testified he directly questioned Dominick about the report and credited his direct eye contact and calm over the inmates' reports. No discipline followed.

Sometime in 1997, Stella Noga,[13] who had served time at the Jail, met with Huerfano County Commissioner Charles Montoya at his office and complained of sexual and drug-related activities at the Jail, as well as her inability to get her prescription drugs. Commissioner Montoya testified he met with Sheriff Salazar who

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[11] Sheriff Salazar agreed a third woman, Barbara Garcia, verified Ms. Flecksteiner's report as well, although her statement is not in the record.

[12] She wrote, "[t]he other women will not back me up – they will probably ostracize me for this. Frankly, I don't care. I would like to do my time in peace & be left alone. I see no reason for our privileges to be up to the whims of Sgt. Gonzales. . . ."

[13] Ms. Noga is also called Stella Duran in the depositions.

"thought maybe it was a personal vendetta, or to that effect. Because Stella was kind of – I don't know how you would describe her, but I think kind of an arrogant little girl. And she did occasionally cause problems, or whatever." Commissioner Montoya explained Ms. Noga's brother, Miguel Duran,[14] is married to his daughter, and he stated, "I know she was a troublemaker."

On October 16, 1997, police officers in Pueblo, Colorado, arrested Dominick, who was hostile and combative after being removed from a local bar for harassing female dancers. Finally restrained with pepper spray, Dominick told officers he was a "cop in Walsenburg" and threatened injury.[15] On October 21, 1997, Sergeant Zudar placed a written warning in Dominick's file for his violating "certain policies . . . one having inmates in the control room," although the additional allegations of sexual misconduct were found unsubstantiated. However, because of the Pueblo arrest, Sergeant Zudar demoted Dominick from sergeant to deputy and placed him on probation for six months, explaining Dominick had "basically been a good officer up until the Pueblo incident and . . . him having inmates in the control room."

Ms. Gonzales further presented evidence of two incidents between October 1997 and October 1998, when the present sexual assaults occurred, to demonstrate the unsafe atmosphere remained at the Jail. First, she listed an incident report in which an inmate wrote that

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[14] Miguel Duran was a sheriff's deputy at the Jail before he was seriously injured while driving a Sheriff's vehicle in a storm.

[15] The bouncers described Dominick as "very big" and were scared by his threats to injure them.

Dominick punched him after he had been restrained by other officers who had left him alone with Dominick. Second, in April 1998, inmate Denise Tefteller wrote a letter to Sheriff Salazar describing Dominick's mercurial temperament and arbitrary system of rewards and punishments based on his mood.[11] In an affidavit, Ms. Tefteller stated that when she was released, she gave her letter to Major Bob and asked him to give it to Sheriff Salazar. In 2000, Sheriff Salazar responded to this affidavit in Ms. Guel's civil action, stating he never saw the letter before his attorney handed it to him at that time. He attested that prior to the October 1998 incidents, "I had never received any *substantiated* information concerning prior sexual improprieties by these Detention Officers." (emphasis added).

Finally, Ms. Gonzales described in detail Major Bob's sexual assault on October 13, 1998, accompanied by the investigative report of the District Attorney's Office. She also included Sheriff Salazar's incident report in which he noted the on duty officer's concern the two female inmates' complaints involved Major Bob and Dominick and the "females were showing signs of emotion as far as being upset. I then read the other statement which will be done on a separate report. I then instructed Officer sierra [sic] to inform these females that he notified me and that the statements they provided would be Investigated [sic]" and that he would speak to them in the morning. Sheriff

[11] She described his angrily answering her call after her "blood pressure shot up," saying "he had a bone to pick with me. Didn't I know Bob tells him everything I tell him (Bob) & who they have in the control room is their business? (Referring to the Monday night party.)" She wrote that Dominick "seems to enjoy" antagonizing inmates. "I'm afraid someone, someday, is going to hurt that boy badly."

Salazar described interviewing Ms. Guel and his meeting with Ms. Gonzales and her public defenders. At that time, approximately 2:30 p.m., shortly after Ms. Gonzales' second encounter with Major Bob, Sheriff Salazar wrote in his report Ms. Gonzales, on the advice of counsel, refused to speak with him, telling him he had her statement from the night before. Shortly after, he acknowledged the District Attorney's order to release both women.

The Magistrate Judge rejected all of Ms. Gonzales' evidence of prior events either as insubstantial and unsubstantiated or disconnected from any specific evidence that Major Bob, the jail administrator, posed a substantial risk; that is, the generalized atmosphere of the Jail would not suffice. Instead, "Salazar's deliberate indifference must be tied specifically to acts of [Major Bob] of which Salazar was aware." Hence, to prove Sheriff Salazar's deliberate indifference, the Magistrate Judge, citing ***Hovater v. Robinson***, 1 F.3d 1063, 1068 (10th Cir. 1993), and ***Lopez v. LeMaster***, 172 F.3d 756, 761 (10th Cir. 1999), asserted "plaintiff must present evidence that would establish that Salazar had knowledge of facts that would lead to an inference that [Major Bob], not other deputies, presented a 'substantial risk of harm.'" Embracing this recommendation, the district court exonerated Sheriff Salazar from any constitutional consequence, finding, because Ms. Gonzales refused to speak with him, "he was unable to do anything." The court further found Sheriff Salazar "took appropriate remedial measures at the time" in addressing past conduct, evidencing "his policy to take appropriate remedial measures when anything was reported to him, including investigation and further disciplinary action where appropriate." In granting the motion for summary judgment, the court concluded

Ms. Gonzales failed to present a triable issue of fact Sheriff Salazar knew Major Bob posed a substantial risk of harm to her.

III. Summary Judgment

The district court adopted the Magistrate Judge's order denying Ms. Gonzales' Eighth Amendment claim on the merits. Having found no constitutional violation in the first instance, neither the Magistrate Judge nor the district court ruled on the issue of qualified immunity; thus, we do not review summary judgment here "somewhat differently than other summary judgment rulings." ***Hovater***, 1 F.3d at 1066, citing ***Hannula v. City of Lakewood***, 907 F.2d 129, 130 (10th Cir. 1990). Rather, we review the district court's grant of summary judgment on the merits of Ms. Gonzales' Eighth Amendment claim de novo, applying the same legal standard used by the district court under Fed. R. Civ. P. 56(c) and viewing the evidence in the light most favorable to the nonmovant. ***Seymore v. Shawver & Sons, Inc.***, 111 F.3d 794, 797 (10th Cir. 1997). Summary judgment is appropriate only if there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus, we ask the "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" ***Saucier v. Katz***, 533 U.S. 194, 201 (2001).[17]

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[17] This standard of review does not ignore the fact that, in the end, defendant still bears the usual summary judgment burden of showing that no material facts remain in dispute that would defeat the qualified

(Continued on following page)

IV. Deliberate Indifference

We preface each foray into this difficult area ("Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another." ***Farmer***, 511 U.S. at 858 (Thomas, J., dissenting)) with the Eighth Amendment proviso requiring "prison officials to 'provide humane conditions of confinement,' which includes taking 'reasonable measures to guarantee the safety of inmates.'" ***Giron v. Corr. Corp. of America***, 191 F.3d 1281, 1285 (10th Cir. 1999), quoting ***Farmer***, 511 U.S. at 832; see also, ***Barney v. Pulsipher***, 143 F.3d 1299, 1310 (10th Cir. 1998). Thus, in a claim that officials failed to prevent harm, an inmate must show, first, "she is incarcerated under conditions posing a substantial risk of serious harm," and, second, that officials had a "sufficiently culpable state of mind." ***Farmer***, 511 U.S. at 834 (quoting ***Wilson v. Seiter***, 501 U.S. 294, 297 (1991)). "Thus, the deliberate indifference standard in a prison-conditions case is a 'subjective' and not an 'objective' requirement. That is, a prison official is liable only if the 'official knows of and disregards an excessive risk to inmate health and safety.' It is not enough to establish that the official should have known of the risk of harm." ***Pulsipher***, 143 F.3d at 1310 (quoting ***Farmer***, 511 U.S. at 837).

Further, as stated in ***Pulsipher***, a plaintiff's uncontroverted claim of "deprivations resulting from sexual assault" are "sufficiently serious to constitute a violation under the Eighth Amendment." ***Id.*** In both ***Hovater*** and

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immunity defense. ***Farmer v. Perrill***, 288 F.3d 1254, 1259 (10th Cir. 2002).

Pulsipher, however, a constitutional violation was not found because the only proof of prison officials' knowledge of a substantial risk of serious harm to a female inmate and failure to protect was predicated on the existence of a per se violation of a written jail policy. In ***Hovater***, the policy dictated that a male guard never enter a woman's cell alone, except in an emergency, 1 F.3d at 1068; and, in ***Pulsipher***, two jailers were required to be present when female prisoners were removed from their cell, 143 F.3d at 1310-1311. We explicitly stated in ***Hovater***, however, "[h]ad Sheriff Hill possessed information that Mr. Robinson as an individual posed a threat to the safety of female inmates, our decision would be different." 1 F.3d at 1068.

Material facts remain in dispute on Ms. Gonzales' Eighth Amendment claim that stand in stark contrast to the absence of any such evidence in ***Hovater*** and ***Pulsipher***. Here, Ms. Gonzales did not rely upon any official policy which could be substituted for Sheriff Salazar's knowledge the Huerfano County Jail where she was assaulted was not a safe place.[18] Instead, viewing the evidence in a light most favorable to her, as we must, it may be fairly inferred Sheriff Salazar's purported ignorance of the dangerous conditions in the jail was a direct result of his lackadaisical attitude toward his responsibility to run the institution. An inference of the sheriff's lack of responsiveness can also be drawn from other facts.

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[18] Indeed, in 2002 deposition testimony submitted in Defendants' supplemental appendix, Sheriff Salazar described instituting written policies and procedures, including hiring additional female staff and new hiring practices, to address a 2001 incident involving four counts of sexual assault of a female inmate by a male detention officer in the Jail.

First, Sheriff Salazar explicitly stated his Jail Administrator did not want to investigate allegations of problems at the Jail. Second, the evidence indicates the sheriff's consistent willingness to ignore inmate complaints by attributing them to attitudes of the complainants, characterizing them as "troublemakers" or "conjuring up" incidents to "discredit" his deputies, allowed him to excuse his failure to pursue the issues any further. Finally, and most astonishing, when first advised two visibly "upset" female inmates accused two of his jailers of sexually assaulting them, he not only left the prisoners unprotected in the jail, but also in the custody and control of the very men accused of the assaults. When the women were removed for their protection, the decision to do so was not made by Sheriff Salazar, but by the District Attorney. None of this evidence is controverted, and its significance was seemingly ignored by the district court.

Finally, we are constrained to note the district court misread ***Farmer***, believing it required Ms. Gonzales to show Sheriff Salazar specifically knew Major Bob posed a substantial risk of harm to *her*. Rather, the ***Farmer*** Court noted a prison official could not escape liability by showing although "he was aware of an obvious, substantial risk to inmate safety, he did not know that *the complainant* was especially likely to be assaulted *by the specific prisoner* who eventually committed the assault." 511 U.S. at 843 (emphasis added). "[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." ***Id.***

The undisputed evidence of the physical assaults on inmates set against the facts of Sheriff Salazar's knowledge

of reported risks to inmate health or safety, including the documented lapse of security in the control room, complaints of sexual harassment and intimidation, Dominick's demotion for, as Sergeant Zudar characterized it, "a combination of things," as well as the presence in the record of Ms. Tefteller's letter, which she attested was handed to Major Bob, surely raise a reasonable inference that Sheriff Salazar knew of and disregarded an excessive risk to Ms. Gonzales. Under these circumstances, at the least, Ms. Gonzales has raised a triable issue of material fact that Sheriff Salazar had the "requisite knowledge of a substantial risk," which, ***Farmer*** acknowledges, may be demonstrated "in the usual ways, including *inference* from circumstantial evidence." 511 U.S. at 842 (emphasis added).

In the interstice between the facts presented and the inferences arising from evidence of Sheriff Salazar's knowledge of activities at the Jail, this triable issue was prematurely dismissed at the summary judgment stage. Left on remand is for the trier of fact, then, to decide whether these inferences are sufficiently strong to cast constitutional responsibility on Sheriff Salazar's conduct. We therefore **REVERSE** the district court's order granting summary judgment and **REMAND** for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Daniel B. Sparr

Civil Action No. 99-S-1152 (OES)

TEREZA GONZALES,

Plaintiff,

v.

ROBERT MARTINEZ, DOMINICK GONZALES, JOHN SALAZAR, as the Sheriff of Huerfano County, Colorado, and HUERFANO COUNTY, COLORADO,

Defendants.

ORDER

(Filed May 7, 2003)

THIS MATTER came on for hearing on April 30, 2003 on Plaintiff's objections to the February 20, 2003 Recommendation by Magistrate Judge O. Edward Schlatter on Defendants Huerfano County and John Salazar's Motion for Summary Judgment [Doc. #43], filed December 15, 2000. The Court heard the arguments of counsel and reviewed the Recommendation, Plaintiff's objections, Defendants' response to Plaintiff's objections, as well as the entire case file. Based on that review and the arguments made at the hearing, the Court has made a *de novo* determination of those portions of the proposed findings or recommendations to which objection was made. 28 U.S.C. § 636(b)(1). The Court incorporates by reference herein its conclusions of law made in open court on April 30, 2003.

It is, therefore, ORDERED that the Recommendation by Magistrate Judge O. Edward Schlatter is Accepted.

It is further ORDERED that Defendants Huerfano County and John Salazar's Motion for Summary Judgment [Doc. #43] is Granted. Judgment is Granted in favor of all Defendants and against Plaintiff on her first and second claims for relief.

It is further ORDERED that Plaintiff's Motion for Order to Place Case on Trial Docket [Doc. #78] is Denied as Moot.

DATED at Denver, Colorado, this 6th day of May, 2003.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
Senior United States
District Judge

Case No. 99-S-1152 (OES)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ORDER signed by Senior Judge Daniel B. Sparr on May 6, 2003, was served pursuant to Rule 5, Fed.R.Civ.P., on May 7, 2003, by (*) hand delivery; (**) delivery of same to their respective Court pick-up box; (***) depositing the same in the United States mails, postage prepaid, to the following:

Raphael M. Solot, Esq. ***
1777 South Harrison Street, Suite 610
Denver, CO 80210

Carol C. Biddle, Esq. ***
323 South Union Avenue
Pueblo, CO 81003

David R. Brougham, Esq. **
Hall & Evans, LLC
DC BOX 05

Domnick R. Gonzales, Pro se ***
405 East 6th Street
Walsenberg, CO 81089

Magistrate Judge O. Edward Schlatter

/s/ Lucy West
Secretary/Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-S-1152 (OES)

TEREZA GONZALES,

Plaintiff(s),

vs.

ROBERT MARTINEZ,
DOMINICK GONZALES,
JOHN SALAZAR, as the Sheriff of Huerfano County, Colorado, and HUEFRANO COUNTY, COLORADO,

Defendant(s).

RECOMMENDATION THAT MOTION FOR SUMMARY JUDGMENT FILED BY SHERIFF AND COUNTY IN REGARD TO CLAIMS OF TEREZA GONZALES BE GRANTED

(Filed Feb. 20, 2003)

RECOMMENDATION ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

I. INTRODUCTION AND SUMMARY OF RULING

Tereza Gonzales alleges that while she was held in custody at the Huerfano County Jail she was sexually assaulted by two detention officers for Huerfano County, Robert Martinez and Dominick Gonzales. Dominic Gonzales is not related to plaintiff. To distinguish him from plaintiff Gonzales, she will be referred to as plaintiff, while Dominick Gonzales will be referred to as "Gonzales." Plaintiff has brought an action pursuant to § 1983 in which she names Martinez and Gonzales as defendants, as

well as John Salazar in his capacity as the Sheriff of Huerfano County, and Huerfano County itself.

At the time that Ms. Gonzales filed her claims against the above defendants, another individual named Amanda Guel filed similar claims against the same parties. Civil Action #99-S-1152. Ms. Guel's claims have since been settled by the parties, and her case was dismissed by District Judge Daniel B. Sparr on February 11, 2002. Thus, references to "plaintiff" in this Order are to Ms. Gonzales only.

In her Complaint, plaintiff asserts three causes of action: (1) the First Claim, against all four defendants, is for violation of 42 U.S.C. § 1983; (2) the Second Claim, against Sheriff Salazar and the County, is entitled "Negligent Supervision," although its status as a federal claim or a state tort is somewhat in doubt, as explained below; and (3) the Third Claim, against Martinez and Gonzales, is for Assault and Battery. The Third Claim is not at issue in the present motion for summary judgment.

Salazar and the County (referred to for purposes of this Order collectively as "the defendants") have filed a Motion for Summary Judgment, accompanied by a Joint Brief, pursuant to Fed.R.Civ.P. 56(b). Their motion addresses only plaintiffs' first two claims as those claims apply to them. The Third Claim does not apply to Salazar or the County, but applies only to Martinez and Gonzales.

At the time that defendants' motion was filed, it addressed the claims of both Ms. Gonzales and Ms. Guel. Because Ms. Guel's claims have been settled, I consider the arguments of counsel, and the evidence supplied in the pleadings, only as they have application or relevance to the claims in Ms. Gonzales' case. However, Ms. Guel is

included in my discussion in several places because many of the events that occurred with respect to plaintiff also involved Ms. Guel.

Recommendation: I conclude that plaintiff has failed to demonstrate the existence of any genuine issues of material fact with regard to the § 1983 claims asserted in her First Claim for Relief against Salazar and the County, and I conclude further that the undisputed evidence before the Court demonstrates that these defendants are entitled to qualified immunity with respect to those claims.

I also conclude that to the extent that plaintiff is attempting in her Second Claim for Relief to assert, again, a claim under § 1983, Salazar and the County are entitled to the same results that were reached with respect to her First Claim. To the extent that plaintiff is attempting in her Second Claim to assert a state-law claim of negligence, Salazar and the County are entitled to immunity.

Therefore, I recommend that Judge Sparr grant the Motion for Summary Judgment. All of the claims that plaintiff has asserted against Salazar and Huerfano County should be dismissed.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment should be granted where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The evidence in the record must be viewed in the light most favorable to the

nonmoving party, and the nonmovant must be allowed the benefit of all reasonable inferences to be drawn from the evidence. *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be discharged by showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

A genuine factual issue is one that "can reasonably be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Id.* at 250. The substantive law identifies which facts are material. *Id.* at 248. A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way consistent with this purpose. *Celotex*, 477 U.S. at 323-24.

III. FACTS

The facts surrounding the conduct of Martinez with regard to plaintiff are not seriously disputed as between the parties, but the inferences to be drawn from those facts are the focus of several arguments between them. I

present the facts here in the light most favorable to plaintiff, and I have looked primarily to the recitation of facts as they are contained in plaintiff's Answer Brief and exhibits.

Plaintiff alleges that she was subjected to two sexual assaults by defendants Martinez and Gonzales, one occurring on October 13, 1998, and the second occurring on October 14, 1998. Defendants do not deny the occurrence of the first incident, that is, that plaintiff was sexually assaulted by Martinez on October 13, 1998. As a result of that assault, Martinez was terminated from employment on October 15, 1998, and was subsequently charged and convicted of the felonious sexual assault. Gonzales was also terminated at about the same time, and was also charged and convicted of a felony, for a sexual assault by him upon Ms. Guel.

Defendants deny that the second incident, which occurred on the following day, October 14, presents a set of circumstances for which they should be liable pursuant to § 1983. That second incident, along with the events leading up to it, is described below.

The parties agree that on October 13, 1998, Martinez was the Jail Administrator for the County Jail with the rank of a major. On the afternoon of the 13th, Martinez removed plaintiff from the women's detention area and took her to the commissary of the jail. Once in the commissary, Martinez compelled plaintiff to submit to his sexual actions, including his fondling of plaintiff's breasts and genital area, and including the performance by Martinez of oral sex upon plaintiff.

On the evening of the 13th, plaintiff and Ms. Guel gave to the detention officers who were on duty written

statements about the assaults to which they had been subjected by Martinez and Gonzales. The detention officers telephoned Salazar at approximately 8:00 p.m., and informed him about the stories that had been given to them by the two ladies. In response to the telephone call, Salazar came to the Sheriff's Office that same evening. Salazar talked with the officers, and read the written statements that they had received from plaintiff and Ms. Guel. He instructed the officers to inform plaintiff and Ms. Guel that he would interview them the next morning. Salazar did not at that time relieve either Martinez or Gonzales from their duties.

On the morning of October 14th, Salazar transported plaintiff to court, where she was scheduled for an appearance before a judge in regard to the matters for which she was being held in detention. En route to court, Salazar learned from plaintiff that she had prepared a written statement about the assault, apparently other than the one that she had presented to the detention officers on the previous evening. However, she declined to give the latter statement to Salazar. Salazar advised plaintiff to give the statement to her lawyers, who were both public defenders. *See* Plaintiff's Answer Brief, Ex. B at Salazar Depo. Ex. 13. Plaintiff discussed the assault with her public defenders. *Id*, Ex. A at 118.

At the end of the morning judicial proceedings that were conducted on plaintiff's case, she was returned to the jail. Defendants do not deny that at approximately 12:30 p.m. Martinez attempted, as part of a second incident, to continue with plaintiff what he had done on the preceding day. Plaintiff described the events during her deposition. *See* Plaintiff's Answer Brief, Ex. A at 121 *et seq.* In her deposition, she stated that after lunch, Martinez called her

into the control room of the jail; grabbed plaintiff by the arm and said, "Let's start off where we left off yesterday." *Id.* at 121. Plaintiff testified that she informed Martinez that she would not, that "it was bad." *Id.* at 122. She stated that Martinez, in her words, "pressed his body" against her body, "tried to kiss me," and "tried to force my hand . . . to rub his dick with his pants on." *Id.* In response to questions from counsel, plaintiff testified that Martinez did not "have anything unzipped." Defendants' Joint Brief, Tereza Gonzales Depo. (not identified by number or letter) at 124. Plaintiff testified that she "pushed [Martinez] away and went back to the pod." *Id.*

On May 29, 2001, plaintiff executed a one-page Affidavit that was submitted to the court with plaintiff's Answer Brief on May 31, 2001. *See* Plaintiff's Answer Brief, Ex. W. In her Affidavit, plaintiff expands on her deposition testimony in regard to the incident in the control room, and states that when she was called into the control room by Martinez, he "forcibly grabbed me by the arm, pushed his body against me and shoved me into the wall." *Id.* Her Affidavit states that "[a]s a result of Major Martinez' conduct, I felt physical pain to my arm and to my back." *Id.*

Salazar prepared an incident report in which he stated that he intended to interview both ladies once plaintiff was returned from court on the morning of October 14th. Plaintiff's Answer Brief, Ex. B at Salazar Depo. Ex. 13. He interviewed Ms. Guel at 1:00 p.m., and then intended to interview plaintiff at the conclusion of his conference with Ms. Guel. However, he learned that plaintiff was to be re-delivered to court at that time. *Id.* His intended interview with plaintiff was postponed.

By approximately 2:30 p.m. of the 14th, plaintiff was returned to the jail from her afternoon session at the court, and Salazar attempted at that time to interview her. Plaintiff's public defenders arrived at the jail at the same time as plaintiff, and asked to be present for any interview. Their request was granted by Salazar, and in the presence of her public defenders Salazar attempted to conduct a tape-recorded interview of plaintiff. However, plaintiff declined to answer any questions. When Salazar asked her whether she wished for him to investigate the claim that she had presented in her written statement, plaintiff responded by saying, 'you have my statement.' *Id.* Plaintiff does not claim that she reported the second incident with Martinez to Sheriff Salazar when he attempted to interview her.

After his attempted interview with plaintiff, Salazar informed plaintiff's public defenders that he would provide plaintiff's report to the District Attorney and to the Colorado Bureau of Investigation ("CBI"). However, shortly after concluding his attempted interview with plaintiff, Salazar received a telephone call from Deputy District Attorney Patchen in which he learned that the District Attorney was already informed about the matter, apparently by Patchen himself in reaction to reports from plaintiff's public defenders earlier that morning. Salazar also learned from Patchen that CBI also had been informed. Salazar was instructed by Patchen to release plaintiff and Ms. Guel from custody immediately. That was done.

Shortly after 4:00 p.m. of the 14th, an investigator from the Office of the District Attorney arrived at the detention facility. She commenced an investigation of the incidents that had been reported by the two ladies. *Id.* As

noted above, as a result of the investigation, Martinez and Gonzales were suspended on October 15, and subsequently charged and convicted for their assaults.

IV. FIRST CLAIM FOR RELIEF: § 1983

In her First Claim for Relief, plaintiff states a claim pursuant to 42 U.S.C. § 1983. She has sued all of the defendants for violation of her right to be free of cruel and unusual punishment as these rights are secured to her through the Eighth Amendment of the United States Constitution.

A. Plaintiff's attempted Due Process claim.

Plaintiff asserts that she also brings a claim pursuant to the Due Process Clause of the Fourteenth Amendment, because she argues that plaintiff was a pretrial detainee, and not an inmate serving a sentence for a crime. *See* Plaintiff's Answer Brief at 19. Plaintiff's assertion is irrelevant for several reasons. First, plaintiff herself admits that "the measure of proof" is identical for both § 1983 and Due Process violations, and she cites to *Lopez v. LeMaster.* 172 F.3d at 760 n 2; *see* Plaintiff's Answer Brief at 20. However, the *Lopez* case says that more than the measure of proof is identical for Eighth Amendment and Due Process claims. The appellant in *Lopez* claimed a violation to his Due Process rights, and the Tenth Circuit stated: "In determining whether appellant's rights were violated . . . we apply an analysis identical to that applied in Eighth Amendment cases brought pursuant to § 1983." *Id*; *see also Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) ("Although the Due Process Clause governs a pre-trial detainee's claim of unconstitutional conditions of

confinement, the Eighth Amendment standard provides the benchmark for such claims.").

More importantly, the undisputed evidence in this case reflects that plaintiff was not a pretrial detainee. Plaintiff herself states in her brief that she "had been arrested on a bench warrant. Thereafter, during a court appearance she was summarily sentenced to thirty days in jail for a civil contempt of court committed in the presence of the court." *Id.* at 19. Exhibit B of Defendants' Joint Brief is the mittimus that was issued in regard to plaintiff, showing the sentence of 30 days for contempt of court, and reflecting that plaintiff was serving that sentence at the time of the incidents that underlie this case.

Plaintiff argues that "[a] sentence meted out summarily for a civil contempt is most certainly not tantamount to a conviction and sentence with all of the constitutional safeguards having been applied." Plaintiff's Answer Brief at 28. Unfortunately for plaintiff, even a conviction for summary contempt is a "criminal" conviction if the sentence to jail is definite in term, punitive in nature and cannot be purged through some affirmative action by the convicted party. *See* C.R.Civ.P. 107, and see also, e.g., *McVay v. Johnson*, 727 P.2d 416 (Colo.App. 1986). As the Colorado Court of Appeals explained in the *McVay* case:

> There are two categories of contempt of court set forth in C.R.C.P. 107, civil and criminal. Civil contempt proceedings are remedial, and their purpose is to compel performance of an act within the power of the contemnor. In contrast, criminal contempt proceedings involve the imposition of a fine or imprisonment on the contemnor as punishment for an act in derogation of the power or dignity of the court.

Id. at 418; *see also People v. Razatos*, 699 P.2d 970 (Colo. 1985). If the contempt sentence imposed by a court may be eliminated by the party's performance of an action, such as the payment of child support, the sentence is remedial and civil in nature, and is not a punitive or criminal sentence. *Marriage of Crowley*, 663 P.2d 267 (Colo.App. 1983); *Marriage of Woodrum*, 618 P.2d 732 (Colo.App. 1980). That the sentence imposed upon plaintiff in this present case may have been defective because it was imposed in the absence of certain procedures required by Rule 107 does not render plaintiff a "pretrial" detainee. Unless or until plaintiff's sentence was set aside for any reason, plaintiff was serving a sentence of 30 days for "criminal contempt."

Therefore, contrary to plaintiff's view, plaintiff was not a pretrial detainee at the time of the events in this case, and is not entitled to assert a claim based upon the violation of her Due Process rights. However, as previously noted, the point is moot because the analysis for a violation of Due Process rights is identical to the analysis that is conducted for a violation of Eighth Amendment rights.

B. Capacities in which parties are sued.

Plaintiff does not specify whether she is suing Salazar in both his individual and official capacities. In discerning whether a lawsuit is against a defendant personally or in his official capacity, the caption of the suit may be informative but clearly is not dispositive. *Pride v. Does*, 997 F.2d 712, 715 (10th Cir. 1993). The Supreme Court has instructed that the "course of proceedings" in cases should be examined by trial courts in an effort to determine the capacity in which a party is sued. *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985). The Tenth Circuit points to

two factors that should be considered in making the determination: (1) whether punitive damages are sought, and (2) whether the defense of qualified immunity has been raised. *Pride v. Does*, 997 F.2d at 715.

In considering the first factor, I note that plaintiff's Complaint reflects that she is seeking punitive damages from Martinez and Gonzales. *See* Amended Complaint at ¶ 34. Plaintiff alleges that Martinez and Gonzales acted with "malice, or a wanton and reckless disregard" for plaintiff's rights, and she has asked the court to enter an award against them for exemplary damages. *Id.* However, no similar allegation for punitive damages has been made with regard to Salazar or the County.

In considering the second factor, I note that Salazar has raised the defense of qualified immunity. Because this defense has been raised I conclude that the parties have addressed Salazar's case as though he has been sued in his individual capacity, as well as his official capacity, and I will address the claims against Salazar in that light. No individual member of the Board of County Commissioners has been sued personally.

C. Qualified Immunity

Prison officials are required to provide humane conditions of confinement by ensuring that inmates receive the basic necessities of adequate food, clothing, shelter, and medical care and by taking reasonable measures to guarantee the inmates' safety. *See Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994); *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998). Plaintiff alleges that Sheriff Salazar violated her Eighth Amendment rights by failing to protect her from the assaults that she received.

The test for personal liability of a prison official has been stated by the Tenth Circuit as follows:

> In order to hold prison officials liable for violating an inmate's right to humane conditions of confinement, two requirements must be met. First, the deprivation alleged must be objectively "sufficiently serious." *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2521, 2324, 115 L.Ed.2d 271 (1991), depriving the inmate of "'the minimal civilized measure of life's necessities,'" *id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981)). Second, the official must have a "sufficiently culpable state of mind," which in this context means the official must exhibit "deliberate indifference" to a substantial risk of serious harm to an inmate. [*Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977, 128 L.Ed.2d 811 (1994)]; *Wilson*, 501 U.S. at 297; 111 S.Ct. at 2323. Thus, the deliberate indifference standard in a prison-conditions case is a "subjective" and not an "objective" requirement. That is, a prison official is liable only if the official knows of and disregards an excessive risk to inmate health and safety." *Farmer*, 511 U.S. at 837, 114 S.Ct. at 1979. It is not enough to establish that the official should have known of the risk of harm."

Barney v. Pulsipher, 143 F.3d at 1310.

"Deliberate indifference" is a stringent standard of fault, and a showing of simple or even heightened negligence will not suffice to meet the test. *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 407 (1997). To meet the standard requires a plaintiff to demonstrate "a higher degree of fault than negligence or even gross negligence." *Hovater v. Robinson*, 1 F.3d 1063,

1066 (10th Cir. 1993). If a prison official knows of a risk of harm to an inmate, but responds reasonably to the known risk, "he will not be held liable even if the harm ultimately is not prevented." *Barney v. Pulsipher*, 143 F.3d at 1311, n 12; *Farmer v. Brennan*, 511 U.S. at 844-45.

Once the defense of qualified immunity has been raised by a defendant, "the plaintiff assumes the burden of proof. *Barney* at 1309. The plaintiff must come forward with sufficient facts to show (1) that the defendant's conduct violated the law, and (2) that the relevant law was clearly established when the alleged violation occurred. *Gehl Group v. Koby*, 63 F.3d 1528, 1533 (10th Cir. 1995). "Where a plaintiff fails to demonstrate that a defendant's conduct violated the law, [the court] need not reach the issue of whether the law was clearly established." *Id*; *Barney* at 1309.

D. Incident of October 13, 1998

The serious nature of the sexual assault by Martinez upon plaintiff on October 13 1998, is not disputed by defendant. The undisputed conduct of Martinez on that occasion constitutes a clear violation of plaintiff's Eighth Amendment rights.

Salazar argues that no evidence exists in the record of this case that shows that he had knowledge of any conduct by Martinez prior to October 13, 1998, such that he would know that Martinez posed a substantial risk of harm to female inmates. In the absence of such evidence, Salazar argues, plaintiff is unable to show that his conduct violated the law.

Plaintiff argues that numerous incidents prior to October 13, 1998, provided Salazar with actual notice of "an unsafe environment" in the jail (Plaintiff's Answer Brief at 24), and actual knowledge of facts "from which to conclude that the female inmates at the Huerfano county Jail were incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 21. Plaintiff presents a list of the incidents that occurred before October 13, 1997, that she claims are the basis for Salazar's knowledge of the risk presented to her by Martinez. I list them here more-or-less as plaintiff has provided them in her Answer Brief.

- Salazar was aware that his predecessor and the prior supervisory staff found Captain Martinez to be "lax in his supervision at the jail." Plaintiff's Answer Brief at 2.

- Martinez had last been evaluated by Salazar in 1994. *Id.*

- Deputy Gonzales had "previously been charged with an alcohol related traffic offense and also had been convicted for fighting." *Id.* at 3.

- A male inmate named Maldonado was beaten on August 7, 1997. His complaint was "torn up" by jail staff, but he was moved to another pod. *Id.*

- Plaintiff alleges that the inmate was beaten again on October 31, 1997, and that the guards did nothing during the beating. However, plaintiff's exhibits do not support this allegation, and her exhibits are incomplete. *See id.* at 3, and at Ex. B, deposition testimony of Salazar at pgs 113 & 115, and

see Depo. Ex. 17 to Ex. B, page 1 of 2 (page 2 not provided).

- On August 10, 1997, a detention officer named Ruiz filed an incident report with the Sheriff that stated that he had observed inmates sitting in the control room, that some of the inmates' eyes were bloodshot, that one inmate "seemed to be acting out of the ordinary," and that the inmates "seemed to know how to run all the controls in the control room." *Id.* at 4, and at Ex. E. The incident was assigned to Sgt. Paul Zudar for investigation. *Id.*, Ex. E. Plaintiff admits that deputy Gonzales was reprimanded for this incident. *Id.* at 5.

- On October 14, 1997, Sgt. Dana Montoya, a female deputy, reported that an inmate had told her that deputy Gonzales had exposed himself to several female inmates, and offered female inmates the opportunity to perform oral sex with him. *Id.* at 4, and at Ex. F. Plaintiff states that Sgt. Zudar investigated and found the incidents to be unsubstantiated. *Id.* at 5, and *see* Ex. I.

- Plaintiff alleges that "[i]n 1996 or 1997 Stella Duran Noga[,] a former inmate at the jail[,] went to the office of the Huerfano County commissioners and . . . explained . . . [to Commissioner Charles Montoya] that there was sexual activity as well as drug related activities going on at the Huerfano County Jail." *Id.* at 5, and at Ex. J (Noga depo.). Beyond mention of "sexual activities," Noga provided no other details. *Id.*, Ex. J at 20. The three Commissioners reported the complaint to Salazar the same day the complaint

was made. *Id.* Commissioner Montoya had known Noga for 15 years, and did not regard her as a credible person. *Id.* at 20-21. The Commissioners and Salazar discussed Noga's complaint and discussed various options for housing inmates. *Id.* at 29; *and see* Defendants' Reply, Montoya depo. at 8.

- Plaintiff alleges that in 1998, during an incident with an unruly inmate named Lopez in which several officers were involved, the inmate reported that he had been punched by deputy Gonzales. Plaintiff's Answer Brief at 7, and at Ex. T.

- On April 9, 1998, a female inmate named Tefteller gave a letter to Martinez, for transmission to Salazar, in which she complained that deputy Gonzales had sexually harassed her by attempting, unsuccessfully, to lift her t-shirt and grab her breasts. *Id.* at Ex. K & L.

- On October 16, 1997, deputy Gonzales was arrested in Pueblo, Colorado on charges of resisting arrest, menacing and disorderly conduct. *Id.* at 7. Plaintiff admits that Gonzales was suspended pending the outcome of an investigation by Sgt. Zudar, and plaintiff admits that Zudar recommended that Gonzales be demoted in rank, suspended one week without pay and placed upon probation for six months. *See id.*, Ex. C. Plaintiff does not argue that this recommendation was not followed by Salazar.

With minor exceptions, none of the incidents listed by plaintiff makes any reference at all to any serious misconduct by Martinez. Instead, plaintiff describes a history of

misconduct by other deputies, including deputy Gonzales. Plaintiff has presented absolutely no evidence to support an inference that Martinez posed a substantial risk of harm, or even *any* risk of harm, to female inmates.

In the absence of any evidence of incidents that might reflect that Martinez posed a risk of harm to female inmates, plaintiff argues that "[it] makes no sense to say that Salazar's deliberate indifference must be tied specifically to acts of Martinez of which Salazar was aware. It is the atmosphere at the jail which created the substantial risk of harm to female prisoners, and which is the keystone to liability." *Id.* at 24. Plaintiff is mistaken in this assertion. Plaintiff was harmed by Martinez on October 13, 1997. In order for plaintiff to prove that Salazar was deliberately indifferent to the potential for that event, plaintiff must present evidence that would establish that Salazar had knowledge of facts that would lead to an inference that Martinez, not other deputies, presented a "substantial risk of harm." *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993); *Lopez. v. Lemaster*, 172 F.3d at 761. Plaintiff has presented no such evidence.

The Tenth Circuit addressed arguments similar to those presented by plaintiff here in *Hovater v. Robinson*. In that case, plaintiff alleged that a jail deputy named Robinson made a sexual advance toward her. However, she did not inform anyone of this incident. Later, she alleged that Robinson again assaulted her by forcibly sodomizing her in the chapel/library of the jail. Again plaintiff did not inform anyone. Finally, she informed an elevator operator at the jail of the events that had occurred, and the elevator operator in turn reported plaintiff's remarks to appropriate authorities. Plaintiff in *Hovater* argued that even though the Sheriff had never received any information

that Robinson himself posed a risk of harm to female inmates, the Sheriff nevertheless had disregarded an obvious risk to the safety of female inmates by allowing a single male guard to have custody of a female inmate. *Id.* at 1066.

The Tenth Circuit rejected plaintiff's argument. The Court stated:

> Sheriff Hill had no knowledge that Mr. Robinson was a threat to the female inmates. Any known harm could stem only from the mere fact of Mr. Robinson's gender. To find a harm present in these circumstances would, in effect, require the conclusion that every male guard is a risk to the bodily integrity of a female inmate whenever the two are left alone. There is absolutely no evidence in this record to support that conclusion. A constitutional violation may not be established by a reliance upon unsupported assumptions. Had Sheriff Hill possessed information that Mr. Robinson as *an individual* posed a threat to the safety of female inmates, our decision would be different.

Id. at 1068, emphasis added; *see also Barney v. Pulsipher*, 143 F.3d at 1311 (holding that "without any evidence of sexual misconduct" in the background of the particular jailer who perpetrated the offense, plaintiff had failed to raise an issue of fact that Sheriff or Commissioners acted with deliberate indifference).

The circumstances of this present case are similar to those in *Hovater*. Plaintiff is asking the court to find that Martinez posed a risk of harm to plaintiff solely because of the conduct of other deputies, generalized conditions of jail misconduct, or the "atmosphere at the jail." As in the

Hovater case, plaintiff's argument here requires an assumption that is completely unsupported by any evidence in the record. "[A] constitutional violation may not be established by a reliance upon unsupported assumptions." *id.* Plaintiff's list of incidents – recited in the above bullet points, and taken singly or cumulatively – provide no basis upon which the court may infer that Martinez as an individual had engaged in conduct which reasonably would lead Salazar to conclude that on October 13, 1997, he posed a risk of sexual assault upon female inmates.

For all of the above reasons, I conclude that Salazar is entitled to qualified immunity for the assault upon plaintiff that occurred on October 13, 1997. This qualified immunity is separate from any immunity to which he may be entitled for the second incident that occurred on the following day.

E. Incident of October 14, 1997

Salazar does not dispute that he received a report on the evening of October 13, 1997, about the assault on plaintiff by Martinez that had occurred earlier that day. Thus, as of the evening of the 13th, Salazar had some knowledge that Martinez might pose a risk of harm to plaintiff. Nevertheless, I conclude that Salazar is entitled to qualified immunity for this incident as well for two reasons: (a) the confrontation between plaintiff and Martinez did not rise to the level of an Eighth Amendment violation, and (b) Salazar was taking reasonable measures to address the risk of harm that may have been presented.

(1) No Eighth Amendment violation. Not all violations of inmate rights are objectively "sufficiently serious," as that phrase is construed, for Eighth Amendment

purposes. *Wilson v. Seiter*, 501 U.S. at 298. In *Adkins v. Rodriquez*, plaintiff was subjected to sexual harassment that the Tenth Circuit found to be "outrageous and unacceptable conduct by a jailer." *Adkins v. Rodriquez*, 59 F.3d 1034, 1037 (10th Cir. 1995). Nevertheless, the Court stated that

> "[N]ot . . . every malevolent touch by a prison guard gives rise to a federal cause of action. . . . The Eighth Amendment's prohibition of cruel and unusual punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind."

Id. (quoting *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992).

Plaintiff's recitation of the events that occurred at approximately noon of October 14th are summarized above in section III above. Plaintiff stated that Martinez "pressed his body" against her body, "tried to kiss me," and "tried to force my hand to "rub his dick." Without question, the conduct of Martinez was "outrageous and unacceptable." However, plaintiff did not testify that Martinez accomplished either the act of kissing her, or the act of having her rub his privates. Plaintiff testifies that Martinez "tried" to get her to do these things, but she "pushed him away and went back to her cell." This effort by Martinez, though rude and repugnant, and certainly worthy of disciplinary measures by the Sheriff, is not conduct that offends the strictures of the Eighth Amendment. *Adkins* at 1037.

Plaintiff filed her Answer Brief in this matter on May 31, 2001. Just two days before the brief was filed, on May

29, 2001, plaintiff executed an Affidavit in which she stated the following:

> 2. When I entered the control room [on October 14, 1998], Major Robert Martinez forcibly grabbed me by the arm, pushed his body against me and shoved me into the wall."
>
> 3. As a result of Major Martinez' conduct, I felt physical pain to my arm and to my back.

Plaintiff's Answer Brief, Ex. W.

Presumably, plaintiff executed this Affidavit in an, effort to rebut defendants' arguments with regard to the application to this case of the Prison Litigation Reform Act ("PLRA"). *See* Defendants' Joint Brief at 14-15; 42 U.S.C. § 1997(e). Defendants have argued that plaintiff's suit for events that occurred on October 14, 1997, is barred by the PLRA because she presented no evidence that she had suffered any injuries other than mental or emotional distress. The PLRA provides that "no federal civil action may be brought by a prisoner confined in a jail . . . for mental or emotional injuries suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997(e). To support their argument, defendants point to the testimony of plaintiff that reflects that, in addition to the lewd overtures, Martinez did little more than to merely grab plaintiff's arm on the 14th.

Plaintiff asserts that "defendants' argument that no physical injury occurred on October 14 flies in the face of the undisputed facts." Plaintiff's Answer Brief at 25. To support this assertion, plaintiff directs the attention of the court to Exhibit W, plaintiff's affidavit of May 29, 2001, and points out that plaintiff stated that Martinez caused her "physical pain." *Id.*

Plaintiff's Affidavit of May 31, 2001, is an obvious embellishment of the testimony that she offered during her deposition. The circumstances surrounding plaintiff's presentation of her Affidavit reflect that the Affidavit is an effort by plaintiff to create a sham issue of fact. The Tenth Circuit Court has outlined three factors that a court should consider in determining whether a supplemental affidavit is an effort to create a sham issue of fact. *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 973 (10th Cir. 2001). The Court instructs courts to consider the following: (1) Was the affiant cross-examined during her earlier testimony? (2) Did the affiant have access to the pertinent evidence at the time of her earlier testimony? And, (3), does the earlier testimony reflect confusion which the affidavit attempts to explain? *Id.*

First, in the circumstances of this present case, the court has not been provided with the entire deposition testimony of plaintiff, and cannot know whether she was cross-examined or not. However, the *opportunity* for cross-examination by counsel for plaintiff was clearly present, and the failure by plaintiff and her attorney to clarify this portion of her testimony leads to the inference that no correction was considered appropriate by them. Second, plaintiff certainly had access to the "pertinent evidence" at the time of her deposition. After all, this portion of the deposition centers upon her recollection of the conduct of Martinez toward, her during the incident of October 14. Third, nothing about the deposition testimony reflects any confusion by plaintiff as to the questions being asked, or the purpose for the questions. *See* Plaintiff's Answer Brief, Ex. A, Plaintiff's Depo. at 121 *et seq.* Finally, nothing about the affidavit represents an attempt by plaintiff to

explain any apparent confusion that allegedly was present in the deposition.

The Affidavit is nothing more than an effort by plaintiff to embellish her deposition in an effort to rebut the defense that is raised by defendant in regard to the application of the PLRA to the events in her case. In these circumstances, I find that plaintiff is attempting to create a sham fact issue. *Ralston*, 275 F.3d at 973. For that reason, I ignore the contents of her Affidavit, and in determining whether the conduct of Martinez on October 14 rose to the level of a violation of plaintiff's Eighth Amendment rights, I consider only the contents of plaintiff's deposition. The testimony of plaintiff at her deposition does not establish that her constitutional rights were violated by the lewd overtures and momentary grabbing by Martinez.

(2) Salazar was attempting to address the problem with reasonable measures. Even if I were to find that the incident of October 14 constituted a violation of plaintiff's Eighth Amendment rights, plaintiff has failed to provide evidence that would establish that Salazar was deliberately indifferent to the risk. A prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Adkins v. Rodriquez*, 59 F.3d at 1037; *Lopez v. Lemaster*, 172 F.3d 756, 761 (10th Cir. 1999). If a prison official knows of a risk of harm, but responds reasonably to the risk, "he will not beheld liable even if the harm ultimately is not prevented." *Barney v. Pulsipher*, 143 F.3d at 1310, n 12 (*citing Farmer*, 511 U.S. at 844-45).

Plaintiff has presented no evidence that would reflect that Salazar ignored plaintiff's complaint. The undisputed facts reflect that Salazar received her written complaint from the jailers sometime after 8:00 p.m. on the evening of October 13 and he stated his intention to investigate her claim the following morning. Plaintiff's Answer Brief, Ex. B, Salazar Depo. Ex. 13. Salazar attempted to begin his investigation, and did, in fact, interview Ms. Guel on the morning of October 14, who presumably described her encounter with Gonzales. Salazar was interrupted in his effort to interview plaintiff by her need to be transported to court. However, the undisputed evidence reflects that Salazar attempted twice to question plaintiff about the events of October 13 – once during the morning of October 14 while en route to court with plaintiff, and again that afternoon in his office with plaintiff's lawyers present – but on each occasion plaintiff declined to answer any questions. Even though plaintiff had allegedly suffered a second incident with Martinez between the two times that Salazar had attempted to question her, and even though plaintiff's lawyers were present during Salazar's second attempt to question her, plaintiff failed or refused to report this incident to him.

Arguably, Salazar could have suspended, or even confronted, Martinez on the evening of October 14, immediately upon receiving plaintiff's written report, thereby possibly averting the second incident. The test, however, is not whether he could have or should have acted in a certain manner. The test is whether his failure to do so constituted deliberate indifference on his part. Salazar's effort to interview plaintiff and Ms. Guel before proceeding further, on its face, is not an unreasonable response to the reports that he had received. At worst, his failure to

confront or suspend Martinez before interviewing the complainants can be viewed as little more than negligence on his part. Even gross negligence by Salazar would not suffice to attach liability to him. *Hovater v. Robinson,* 1 F.3d at 1066.

In summary, where plaintiff alleges, as here, that the constitutional violation is the result of a failure to act on the part of Salazar, plaintiff must present evidence that demonstrates that the inaction was the result of "deliberate indifference" to the risk of harm. *See City of Canton v. Harris,* 489 U.S. 378, 389 (1989). Plaintiff has presented no such evidence. Because Salazar responded reasonably to the risk of harm, he cannot be held liable even though the harm ultimately was not prevented. *Barney v. Pulsipher,* 143 F.3d at 1311, n 12.

F. Application of PLRA

Defendants argue that plaintiff's claims with regard to the events of October 14, 1997, are barred by the provisions of the PLRA. I addressed this argument in the preceding section. Having stricken the Affidavit that was prepared by plaintiff approximately one year after her deposition, plaintiff must support her claim with only the testimony that she presented during her deposition. That testimony is insufficient to escape the bar of the PLRA. Plaintiff's deposition testimony reflects that during the incident of October 14, plaintiff suffered no physical injury. In the absence of a physical injury, she is barred from suing solely for the "mental or emotional injuries" that she suffered on that day. 42 U.S.C. § 1997(e).

V. MUNICIPAL LIABILITY

Plaintiff has sued both Salazar and the County in their official capacities. Plaintiff's claim against Salazar in his official capacity as Sheriff is simply another way of suing Huerfano County itself. *Lopez v. Lemaster,* 172 F.3d at 762.

> Under 42 U.S.C. § 1983, a local government may be held liable for the constitutional violation of its employees only when employee action pursuant to official municipal policy . . . caused a constitutional tort. Therefore, to establish municipal liability a plaintiff must show (1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the violation alleged.

Hollingsworth v. Hill, 110 F.3d 733, 742 (10th Cir. 1997) (citation and quotations omitted). In order to hold Huerfano County liable, plaintiff must show not only that a constitutional violation occurred, but also that some municipal policy or custom was the moving force behind the violation. *Myers v. Oklahoma County Bd. of County Comm'rs,* 151 F.3d 1313, 1320 (10th Cir. 1998).

In her Answer Brief, plaintiff summarizes the undisputed facts with regard to the relationship between Huerfano County and the Office of the Sheriff:

> it is undisputed that Salazar is the chief policy maker for the jail, and that the only area that the Board of County Commissioners controlled in the Sheriff's department was the budget; that the county Commissioners have no control over how the Sheriff runs his department; that the county Commissioners' only concern about the jail was whether it was functional, such as the

> doors, the generator, etc.; that the County Commissioners had no responsibility concerning "constitutional" issues at the jail; and that all policy making conditions concerning personnel at the jail were the responsibility of the sheriff.

Plaintiff's Answer Brief at 19.

Given these undisputed facts, as recited by plaintiff, no liability can be imposed upon Huerfano County for the actions of Salazar. In a recent decision by the Tenth Circuit, the Court held that under Colorado law a Board of County Commissioners lacks the authority to control the activities of a Sheriff with regard to the operation of the Sheriff's office and jail. *Bristol v. Bd. of County Comm'rs of Clear Creek*, 312 F.3d 1213, 1215 (10th Cir. 2002). The Court noted that "[u]nder the Constitution of Colorado, the County Sheriff is a distinct position, separate from the Board of County Commissioners," and that Sheriffs have exclusive control over the hiring and firing of their employees. *Id.* at 1219, citing Colo. Const. art XIV, § 6; § 8; and Colo.Rev.Stat. § 30-10-506. Even though a Board possesses the power to make budgetary decisions with regard to the Sheriff, that power, standing alone, "does not establish the control necessary to treat the Sheriff and the Board as joint employers." *Id.*

Plaintiff argues that Huerfano County can be held liable for the actions, or inaction, of the Sheriff because the Sheriff is the chief policy maker for the Huerfano County Jail. The Tenth Circuit noted in the *Bristol* case that cases from other jurisdictions "do suggest that counties can be held liable for the misdeeds of Sheriffs and their employees when the Sheriff is held to set 'official policy" for the county." *Id.* at 1221. However, the Supreme Court held in *Pembaur v. City of Cincinnati* that "not every decision by

municipal officers automatically subjects the municipality to § 1983 liability." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). The Supreme Court stated that "[t]he fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Id.* at 481-82. The Court emphasized that "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483; *see also, Myers v. Oklahoma County Bd. of County Comm'rs*, 151 F.3d at 1320.

Plaintiff in these present circumstances has pointed to no evidence that reflects that Sheriff Salazar formulated policy that caused plaintiff to be deprived of her constitutional rights. To demonstrate that Salazar adopted a policy, plaintiff must show that the Sheriff, acting in his capacity as the policy maker for the county jail, made a "deliberate choice" from among "various alternatives" to follow a particular course of action, and must show that the policy that resulted from the "deliberate choice" caused the deprivation of rights about which plaintiff makes complaint. *Pembaur*, 475 U.S. at 483; *Hollingsworth v. Hill*, 110 F.3d at 742.

As evidence of policies that Sheriff Salazar allegedly formulated, plaintiff asserts that Salazar "never visit[ed] the jail." Plaintiff's Answer Brief at 30. First, the assertion by only one inmate, Noga, that Salazar never visited the jail while she was an inmate hardly elevates her assertion to the level of "fact." Second, Noga's comment certainly does not establish the conclusion that Salazar

made a deliberate policy decision that he would never visit the jail. And, third, even if Salazar had made such a decision, plaintiff cannot establish that the failure of the Sheriff to personally visit the jail was the moving force that resulted in the deprivation of a constitutional right. Plaintiff has not shown that Sheriffs are required by some rule or law to personally visit jails, meaning the cell areas, and are prohibited from delegating that function to other deputies.

Plaintiff also argues that Salazar "left it up to others to investigate serious violations of constitutional rights at the jail." *Id.* Plaintiff's argument establishes nothing more than that Salazar had discretion either to investigate matters at the jail himself, or to assign such investigation to another employee. As the Supreme Court noted, such exercise of discretion does not give rise to municipal liability. *Pembauer* [sic], 475 U.S. at 481-82. Even if Salazar's decision to delegate the responsibility for investigations gives rise to a policy, plaintiff cannot demonstrate that the delegation of investigative responsibilities by a Sheriff constitutes deliberate indifference to the rights of inmates, or could be the moving force for any violations that may occur. On the contrary, the fact that Salazar had in place a system for investigations of misconduct of any type in the jail demonstrates that the Sheriff was other than indifferent to the rights of the inmates.

Plaintiff asserts that Salazar "did not supervise his jail personnel." Plaintiff's Answer Brief at 30. However, plaintiff has failed to present facts that support this claim. Nothing in the plaintiff's Answer Brief or exhibits supports an inference that Salazar either had a practice or a policy whereby he did not supervise his jail personnel. None of the information contained in the bullet points in

section IV.B above, which is taken from plaintiff's brief and exhibits, would lead to a conclusion that Salazar did not supervise his jail personnel. Instead, the evidence contained in the bullet points suggests that when deputies were accused of misconduct, Salazar or his investigator inquired or investigated, and, where appropriate, administered disciplinary measures. This practice or policy appears to be present in the circumstances of this case to the extent that jail deputies received the reports that were filed by plaintiff and Guel, passed the reports along to the Sheriff, and the Sheriff initiated an investigation.

Finally, plaintiff argues that "Salazar exhibited deliberate indifference to conditions at the jail which proved a substantial danger to the welfare of female inmates." *Id.* This is a conclusory statement by plaintiff, and does not refer to any particular actions or conduct that reflect a conscious policy decision by Salazar. In fact, this particular conclusion is the primary issue that underlies this litigation.

The Tenth Circuit has stated that in order to establish a pattern of conduct that rises to the level of a policy, a plaintiff must generally show "a pattern of misconduct [that is] approved by the Sheriff." *Bristol v. Bd. of County Comm'rs of Clear Creek*, 312 F.3d at 1215. None of the evidence presented by plaintiff constitutes a showing of a "pattern" of misconduct. Plaintiff merely has provided a series of unrelated incidents of misconduct over a period of several years that were addressed by the Sheriff, his investigator and/or his deputies in different fashions, according to the type of incident presented. And none of the evidence presented by plaintiff establishes that the "misconduct" recited by plaintiff was "approved" by the Sheriff.

In summary, plaintiff has failed to demonstrate the existence of any issue of fact with regard to the liability of Huerfano County. The undisputed facts demonstrate that Huerfano County cannot itself be held liable, and no actions by Salazar resulted in any county policy that would result in liability against the County.

VI. SECOND CLAIM FOR RELIEF: NEGLIGENT SUPERVISION

Plaintiffs Second Claim for Relief is entitled "Negligent Supervision – Salazar and Huerfano County." Plaintiff's Complaint at ¶ 25 *et seq.* In this Claim, plaintiff alleges that Salazar and the County "were negligent in their hiring, retention, supervision and continued employment of both Martinez and Gonzales." *Id.* at ¶ 28.

Salazar and the County move to dismiss plaintiff's Second Claim because, they assert, it is a claim which lies in tort. They argue that the Colorado Governmental Immunity Act ("CGIA") provides immunity to Salazar and the County for any actions "which lie in tort" Defendant's Joint Brief at 17, quoting Colo.Rev.Stat. 24-10-106(1).

The CGIA provides:

> (1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section.

Colo.Rev.Stat 24-10-106(1).

The statute provides that sovereign immunity is waived by a public entity in an action for injuries resulting

from the operation of any jail. *Id.* at 24-10-106(1)(b). However, the statute states that "[t]he waiver of sovereign immunity created in paragraphs (b) (and (e) of subsection (1) of this section does not apply to claimants who have been convicted of a crime and incarcerated in a correctional facility or jail pursuant to such conviction, and such correctional facility or jail shall be immune from liability as set forth in subsection (12) of this section," *Id.* at 24-10-(1.5)(a). This portion of the statute is the part that has prompted plaintiff to argue that she was a "pretrial" detainee.

Plaintiff argues, initially, that her Second Claim is not a state tort. She asserts that "[n]egligent supervision is a valid claim under Section 1983 so long as the element of deliberate indifference to a substantial risk of harm to inmates is shown." Plaintiff's Answer Brief at 26. In plaintiff's view, "[l]ogic would have it that negligent supervision which rises to the level of deliberate indifference has the same constitutional impact as any other claim brought under Section 1983." *Id.* However, plaintiff then argues, in the same section of her brief, that her Second Claim for Relief "is also a valid state claim in which there need not be a showing of deliberate indifference to support the claim." *Id.* at 28. Thus, plaintiff argues that her Second Claim for Relief simultaneously is a federal claim pursuant to § 1983 and "a valid state tort claim" as well.

To the extent that plaintiff is attempting in her Second Claim to re-state the § 1983 claim that she asserted in her First Claim, I have already addressed her that claim in the preceding sections. I concluded that plaintiff had failed to demonstrate the existence of a genuine issue of material fact with regard to the element

of deliberate indifference and Salazar's entitlement to qualified immunity.

Plaintiff's reference to "negligent hiring" raises no new issue, particularly in light of the fact that plaintiff has not pointed to any particular facts surrounding the hiring of Martinez that meet the tests established by the courts. The Tenth Circuit has stated:

> Merely showing that a municipal officer engaged in less than careful scrutiny of an applicant resulting in a generalized risk of harm is not enough to meet the rigorous requirements of "deliberate indifference." Culpability requires a strong connection between the background of the particular applicant and the specific constitutional violation alleged. Establishing municipal liability in the hiring context requires a finding that "*this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff."

Barney v. Pulsipher, 143 F.3d at 1308, *quoting Board of County Commissioners of Bryan county v. Brown*, 520 U.S. at 412, emphasis in original. The evidence in this present case is that Martinez was not even hired by Salazar. *See* Plaintiff's Answer Brief at 1-2. Martinez was employed as a lieutenant for the Sheriff's department at the time that Salazar took office. *Id.* Even assuming that Martinez could be held responsible for the hiring decision, plaintiff has pointed to no facts that would demonstrate that the hiring official was in possession of evidence that reflected that "this officer [Martinez] was highly likely to inflict the particular injury suffered by the plaintiff." *Id.*

Additionally, plaintiff's reference to "negligent supervision" raises no new issue. The Tenth Circuit has adopted the Third Circuit's test for supervisory liability under

§ 1983, and to establish negligent supervision a party must demonstrate a factual basis to support "'allegations of personal direction or of actual knowledge and acquiescence." *Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992) (*quoting Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990), *cert. denied*, 509 U.S. 923 (1993); *see also Lankford v. City of Hobart*, 73 F.3d 283, 287 (10th Cir. 1996). Plaintiff has presented no evidence that reflects either personal direction of the conduct of Martinez by Salazar, or evidence that Salazar had actual knowledge of the conduct of Martinez, and acquiesced in it.

To the extent that plaintiff is attempting in her Second Claim to allege a state tort, her claim is barred by the CGIA. Plaintiff argues again that she was a pretrial detainee, and because she was a pretrial detainee the terms of the CGIA have been waived with respect to her. I addressed this argument in section IV above. In fact, as the mittimus plainly shows, at the time of the events that underlie this case plaintiff was serving a sentence of 30 days for contempt of court. Defendants' Joint Brief, Ex. B. As I stated before, a contempt sentence that is definite in nature, and cannot be purged through any action by the party receiving the sentence, is a criminal penalty.

In summary, plaintiff has failed to establish the existence of a genuine issue of material fact with regard to the application of the CGIA to the state-law tort claim that is contained in her Second Claim for Relief. Salazar and Huerfano are entitled to immunity with respect to that claim.

CONCLUSION

For the reasons that are stated above, I RECOMMEND that the Joint Motion for Summary Judgment filed by defendants John Salazar and the Board of County Commissioners for Huerfano County be GRANTED, and that plaintiff's First and Second Claims for Relief against these defendants be DISMISSED.

Dated at Denver, Colorado, this day of: February 20, 2003

BY THE COURT:

/s/ O. Edward Schlatter
Edward Schlatter
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 99-S-1152 (OES)

Certificate of Service

The undersigned certifies that a copy of the foregoing was delivered on this day of February 20, 2003, by:

(x) delivery to:

Judge Daniel B. Sparr

David R. Brougham
Hall & Evans, LLC
DC Box 5

( ) e-mail to:

( ) facsimile to:

(X) depositing same in the United States mail postage prepaid, addressed to:

Raphael M. Solot
Denver Centerpoint II
1777 S. Harrison Street, Suite 1250
Denver, CO 80210

Darol C. Biddle
323 S. Union Ave.
Pueblo, CO 81003

Lee A. Hawke
116 South Walnut
Trinidad, CO 81082

Dominick R. Gonzales
405 East 6th Street
Walsenburg, CO 81089

/s/ Cathy Pearson
Clerk for Magistrate
Judge O. Edward Schlatter

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TEREZA GONZALES, Plaintiff-Appellant, v. ROBERT MARTINEZ; DOMINICK GONZALES; JOHN SALAZAR, as the Sheriff of Huerfano County, Colorado; HUERFANO COUNTY, COLORADO, Defendants-Appellees.	No. 03-1348

ORDER

Filed June 6, 2005

Before **SEYMOUR, PORFILIO,** and **HARTZ,** Circuit Judges.

Appellee John Salazar's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Audrey F. Weigel
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-S-1152

TEREZA GONZALES,

Plaintiff,

vs.

ROBERT MARTINEZ, DOMINICK GONZALES, JOHN SALAZAR, as the Sheriff of Huerfano County, Colorado, and HUERFANO COUNTY, COLORADO,

Defendants.

REPORTER'S TRANSCRIPT
HEARING ON MOTION FOR SUMMARY JUDGMENT

Proceedings before the HONORABLE DANIEL B. SPARR, Senior Judge, United States District Court for the District of Colorado, commencing at 2:07 p.m., on the 30th day of April, 2003, in Courtroom 7, Alfred A. Arraj United States Courthouse, Denver, Colorado.

APPEARANCES

RAPHAEL M. SOLOT, Denver Centerpoint II, 1777 S. Harrison Street, #1250, Denver, Colorado, appearing for the plaintiff.

Suzanne M. Claar, Official Reporter
901 19th Street
Denver, Colorado 80294-3589
(303) 825-8874

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

* * *

[54] these other cases if the defendant's position was correct, when would you ever have a 1983 case?

THE COURT: Your position was correct, when wouldn't you?

MR. SOLOT: You wouldn't when you didn't have series of incidents like this.

THE COURT: What you are saying is any time you have an incident such as this, you would have basically have liability of the sheriff and the county.

MR. SOLOT: No, because –

THE COURT: That's what you are saying.

MR. SOLOT: – every incident such as happened to Ms. Gonzales is not supported by everything that went on at that jail prior to that time.

THE COURT: Well, it begs the issue. The issue is whether or not it has to be individualized as opposed to being general.

Anything else?

MR. SOLOT: Nothing else.

THE COURT: Mr. Brougham, you have any surrebuttal?

MR. BROUGHAM: No, your Honor.

THE COURT: Okay.

The matter comes on for review of the magistrate's recommendation. This is a matter of Magistrate Judge O. Edward Schlatter who, in response to a referral by this court, which [55] was challenged unsuccessfully, magistrate having failed to recuse himself, and not appealed, reviewed the Motion for Summary Judgment filed on December 15th of 2000, the response to the Motion for Summary Judgment filed by the plaintiff, motion was filed by the defendant on May 31st of 2001, and the additional response filed on June 7th of 2002.

On February 20th of 2003 Magistrate Schlatter entered a – I believe 35-page order in the form of a recommendation with respect to those documents.

The case arises out of an allegation by the plaintiff, Ms. Gonzales, while she was held in custody in Huerfano County jail she was sexually assaulted by two detention officers, Robert Martinez and Dominick Gonzales.

Gonzales, the officer, was not related to the plaintiff. The complaint seeks three causes of action according to the magistrates recommendation. First claim against four defendants, the two officers, the sheriff and the Huerfano County under – under 42 United States Code 1983.

The second claim against Sheriff Salazar and the county entitled negligent supervision, and the third claim against Martinez and Gonzales personally for assault and battery which is not at issue today.

That claim apparently remains; the two individual defendants are not present or represented.

Plaintiff recommended – or the magistrate recommended [56] that the plaintiff had failed to demonstrate the existence of genuine issues of material fact with regard to the 1983 claims asserted in her first claim for relief against Salazar and the county, and concluded further that the undisputed evidence before the court demonstrated that the defendants would be entitled to qualified immunity with respect to those claims.

To the extent plaintiff was attempting in the second claim for relief to assert a claim under 1983, the magistrate concluded that Salazar and the county were entitled to the same results as the first claim after a discussion as to whether or not the second claim was even appropriate under the provisions of 42 United States Code 1983.

The recommendation of magistrate concluded that – oh, and also the magistrate concluded that should the second claim be an attempt to assert a state law claim of negligence, that Salazar and the county were entitled to immunity under the state immunity act, and the magistrate, therefore, recommended the granting of the Motion for Summary Judgment as to these two claims, both the – some of which are the total claims against Salazar and Huerfano County, and that they should, therefore, be dismissed.

I'll not review the facts. I think they are very well stated in the magistrate's recommendation commencing at page 4. I will also affirm what the magistrate stated, and that is that the facts here are essentially undisputed. Although there are [57] some detailed disputes as to the details of the facts between the parties, basically the incidents that were involved here are undisputed by the parties.

To the extent, however, they are disputed, a review of the record appears to indicate to me that the magistrate's recitation of the facts as set forth in his recommendation commencing at page 4 and continuing through and including the first two paragraphs of page 9, is an appropriate summation of the facts.

Ruling on the first claim for relief, an alleged claim for violation by the plaintiff for violation of a right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution, the magistrate reviewed the claim based on the plaintiff's assertion that it was pursuant to the Eighth Amendment and also the due process clause of the Fourteenth Amendment.

I don't hear a serious argument made in this *de novo* review today with respect to this claim, but in reviewing the magistrates recommendation, the magistrate has basically, first and foremost, indicated that the issue turned on whether or not the plaintiff was considered a pre-trial detainee at the time, and after determining at page 10 of this recommendation that the undisputed evidence in the case reflected the plaintiff was not a pre-trial detainee, that she herself stated that she had been arrested on a bench warrant, that during the [58] court appearance she was summarily sentenced to 30 days in jail for civil contempt of court committed in the presence of court, that Exhibit B of the defendant's brief was the mittimus that was issued regarding the plaintiff showing the sentence, and I emphasize the word "sentence" of 30 days for contempt, and that the plaintiff was serving sentence at the time of the incidents.

And magistrate also found that she was convicted of – that a conviction of summary contempt was a criminal

conviction in the event the sentence was definite to term and punitive in nature and could not be purged by some affirmative action. That is a correct summary of the definition of criminal conviction under the auspices of a contempt judgment by the court.

The magistrate concluded that the plaintiff was not a pre-trial detainee at the time of the events and not entitled to assert a claim based on due process.

However, the magistrate went on to conclude, and I think correctly, that this point was basically moot at any rate, because the analysis for the violation of due process rights is basically identical to that in the Eighth Amendment case under *Lopez v. LeMaster*, the magistrate noted that the measure of proof is identical in both 1983 and due process violations. The *Lopez* case – that's what the plaintiff – strike that.

[59] Plaintiff cites the *Lopez* case. The *Lopez* case, according to the magistrate's review, indicates that the measure of proof is identical between Eighth Amendment and due process claims.

After a thorough analysis of the *Lopez* case in page 9 and 10 of the magistrate's recommendation the magistrate concluded that, although due process governs a pretrial detainee's constitutional requirements, the Eighth Amendment standards provide a bench mark for the review of such claims, and then concluded that the undisputed evidence, however, was that the plaintiff was not a pre-trial detainee.

I felt that – I feel that those conclusions are certainly correct in their application to this case.

Moving on to magistrate's analysis of the inquiry here, looking to the issue of qualified immunity I hadn't heard a whole lot of argument about today, the magistrate concluded that the defense of qualified immunity has been raised by the defendant, which requires the plaintiff to assume the burden of proof of coming forward with sufficient facts to show defendant's conduct violated the law, relevant law was clearly established when the alleged violation occurred, and that where a plaintiff fails to demonstrate the defendant's conduct violated the law, the court not reach the issue of whether the law is clearly established.

The magistrate concluded that prison officials are [60] required to provide conditions not inconsistent with the Eighth Amendment – I'll not review the substantial discussion on that issue, and eventually concluded that the defendants, county and the sheriff, were entitled to qualified immunity in this case to the extent that that qualified immunity would apply in any case. I do not disagree with that conclusion based on the review of the magistrate's reasoning.

Moving on to probably the most disputed issues here, when all is said and done, and we get down to what the case is all about, the case refers principally to two incidents, one on October 13th and one on October 14th, but also refers to some group of incidents that occurred prior to that.

In the recommendation of the magistrate, he indicates that the argument by the defendant is there is no evidence in the record of this case showing that the Sheriff Salazar or, for that matter, the county commissioners, had any knowledge of any conduct by Martinez prior to the 13th

such as that would give him notice that Martinez posed a substantial risk of harm to female inmates.

Plaintiff argues that the incidents not only of the 13th and the 14th gave knowledge of all that or notice of what the plaintiff calls an unsafe environment, but there were other incidents occurring prior to that of which the sheriff should have taken note. That included an issue with Martinez where captain – where Salazar was aware sometime prior to this that [61] there was lax supervision by Captain Martinez in the job.

I candidly don't see the relevance of that incident, if in fact that were something which were to be considered. It consists of a complaint against Martinez, but it was a job performance complaint; which, as I think I spoke or raised in colloquy, was not relevant to the specific issues here, that is the danger to female inmates.

The second incident to which the plaintiff refers was that Martinez had last been evaluated by Salazar in 1994. I candidly don't see any relevance of that issue either, and these are the issues that, incidentally, are not from my review of the file but rather from the magistrate's review of the list of incidents presented by the plaintiff.

There was then an incident with respect to Deputy Gonzales, with alcohol traffic offenses and convicted of fighting. I would note there that that incident referred to Mr. Gonzales, not Mr. Martinez.

Then there was an incident with regard to male inmate named Maldonado on August 7th, 1997, where he was allegedly beaten by the jail staff and his complaint was torn up. Again, this referred to, I believe, some matters having to do with others than Mr. Martinez.

Another incident was with regard to a beating in October of '97. I don't see any indication as to exactly who that referred to. On August 10th there was another incident [62] involving the inmates in the control room which referred specifically to Gonzales, and there was an investigation by Sergeant Paul, not Paula, Zudar, and as a result of that investigation, Deputy Gonzales or Mr. Gonzales was reprimanded.

The final incident – another incident with regard to Gonzales, was Sergeant Montoya, female deputy, reported an inmate told her Gonzales had exposed himself. Again, Sergeant Zudar investigated and found this to be an unsubstantiated incident.

The point being an investigation was undertaken in that case. Stella – one Stella Noga, or the lady to whom counsel for the plaintiff referred in his closing remarks, a former inmate in the jail, complained to the commissioners with regard to the activities in the jail with regard to general sexual activities.

However, it was also noted in reading of the Noga deposition that she specifically indicated that Mr. Martinez was a decent person and would not be involved in that kind of affair.

The record should also clearly reflect this man had been a – had had an apparently relatively unspotted, unscathed record for a period of approximately eighteen, nineteen years, as an employee of this department. He had had a couple of small incidents as referred to here, speaking now of Mr. Martinez, but nothing to give any indication that he had [63] any possible type of prejudice toward females or intent to bother female inmates.

Another incident in 1998 is alleged, again involving Gonzales, another incident in 1998, April, involving Gonzales and sexual harassment; another incident in October involved Gonzales in Pueblo.

Um, and the magistrate observed, as do I, that none of the incidents here made any reference whatsoever as to any misconduct by Mr. Martinez. The plaintiff presented absolutely no evidence, according to the magistrate, to support an inference that Martinez posed a substantial risk or even any risk of harm to female inmates. Quite to the contrary, based on the comments by Ms. Noga, it would appear to the contrary.

The magistrate observed that the plaintiff is asserting that there was an atmosphere in the jail which created a substantial risk of harm to female prisoners, and that is the keystone of her claim to liability here.

Magistrate observes, and I agree, that the plaintiff's assertion is misapplied and mistaken. In order for the plaintiff to prove that Salazar was involved or was viable here, there must be a showing of deliberate indifference to the potential for the event alleged in this claim.

Um, the magistrate noted that the plaintiff must present, and I quote from page 18, "Plaintiff must present evidence that would establish that Salazar had knowledge of [64] facts that would lead to an inference that Martinez," I emphasize Martinez, "not other deputies, presented a substantial risk of harm." In support of that position, the magistrate quotes the case of *Hovater*, H-O-V-A-T-E-R, *v. Robinson*, 1 F.3d 1063 at 1068 and *Lopez v. LeMaster*, 172 F.3d at 761. He concludes that plaintiff has presented no such evidence.

The case of *Hovater v. Robinson* upon which the magistrate relies generally presents a situation where a former jail inmate sued the sheriff for civil rights violations by failing to protect her and failing to supervise and train jail employees adequately, allegedly resulting in a sexual assault by one of the sheriff's detention officers, and I believe the gentleman's name in question in the *Hovater* case was one Mr. Robinson.

The Tenth Circuit in the *Hovater* opinion authored by Judge Seymour held that the proper standard for Eighth Amendment claims based on the condition of confinement is deliberate indifference until official or municipality acts with deliberate indifference of its conduct or adopted policy disregards – excuse me – let me start that over again. Proper standard for Eighth Amendment claim based upon condition of confinement is deliberate indifference under which official or municipality acts with deliberate indifference of its conduct or adopted policy, disregards known or obvious risks, [65] that is likely to result in the violation of a prisoner's constitutional rights.

Plaintiff here alleges that this deliberate indifference standard here is satisfied. The opinion by Judge Seymour reflects that the Tenth Circuit agreed that Ms. Hovater – that an inmate has a constitutional right to be secured in bodily integrity and free from attack by prison guards. They also acknowledge that a prison official's failure to protect the inmate from harm, known harm, may constitute a constitutional violation. I will omit the citations. You can read the case.

In the case the District Court found evidence of risk of harm because the jail's manual included procedures to keep a male guard from having unsupervised care of a

female inmate. The court accepted Ms. Hovater's argument that it was apparent that Sheriff Hill knew of the risk to female inmates in custody of male guards because the jail had a policy to prevent.

The asserted rationale for the policy was not asserted by any evidence in the record. Sheriff Hill argued on appeal that the policy was adopted to protect male guards from false complaints. Indeed, there is some evidence which supports Sheriff Hill's argument, and they go on to talk about that. Thus, the mere existence of the policy at issue does not establish an obvious risk that females left alone with male guards are likely to be assaulted was the holding of the court.

[66] Quoting, Sheriff Hill had no knowledge that Mr. Robinson was a threat to a female inmate. Any known harm could stem only from the mere fact of Mr. Robinson's gender. To find for the plaintiff in these circumstances would in effect require the conclusion that every male guard is at risk – is a risk to the bodily integrity of a female inmate whenever the two are left alone. There is absolutely no evidence in this record to support that conclusion.

Had Sheriff Hill possessed information that Mr. Robinson, and I quote here with emphasis, as an individual, posed a threat to the safety of female inmates, our decision would be different. We hold that Ms. Hovater has failed to meet her burden of establishing a constitutional violation and Sheriff Hill is, therefore, entitled to qualified immunity.

I think the case speaks for itself. I think the magistrate's conclusion that the case before us – in the case

before us was Gonzales has presented no evidence to satisfy the burden to show the deliberate indifference under the *Hovater* standard is a fair and correct one.

Magistrate also relies on *Barney v. Pulsipher*, where it was held that without any evidence of sexual misconduct in the background of the particular jailer who perpetrated the offense, plaintiff has failed to raise an issue of fact that the sheriff or commissioners acted with deliberate indifference. That case is found at 143 F.3d at 1299.

[67] It indicates clearly that the plaintiffs' deprivations resulting from sexual assaults are sufficiently serious to constitute a violation of the Eighth Amendment. Nonetheless, there has been no showing that the sheriff and the commissioners were deliberately indifferent by failing to protect them from the assaults. If a prison official responds reasonably to a risk of harm he will not be held liable even if the harm ultimately is not prevented. Prison official's duty under the Eighth Amendment is to ensure a reasonable safety, a standard that incorporates due regard for prison officials' unenviable task of keeping dangerous men and women in safe custody under inhumane conditions.

Sheriff Limb acknowledged these problems and took appropriate measures to alleviate the risk of harm. We explicitly rejected this argument in *Hovater* which had similar facts.

I will not make any further quotes from the *Pulsipher* case. Suffice to say, the magistrate correctly concluded that in this case, that both Salazar and the county – or I am sorry – concluded that Salazar was entitled to qualified immunity under the circumstances.

With respect to the October 14th incident, which commences at page 20 of the – that all involves the arguments made by plaintiff concerning the October 13th incident.

With respect to the October 14th incident, the [68] magistrate notes that as of the evening of October 13th, although Salazar had knowledge that Martinez might pose a risk of harm to the plaintiff, he concluded that Salazar was entitled to qualified immunity for this incident as well for two reasons; namely, that the confrontation between the plaintiff and Martinez did not rise to the level of an Eighth Amendment violation, and with that I clearly agree. The confrontation of October 14th was basically as set forth in the magistrate's recommendation at page 21, summarized as he pressed his body against her body and tried to kiss her. And there was other – some other indication that he took her hand. Conduct was unacceptable as observed by the magistrate; however, the plaintiff did not testify that Mr. Martinez accomplished the act of kissing her or that there was any other – that there was – he did not unzip his trousers or take off his clothes in any way. She simply indicated that at the time of this incident, she – she pushed him away and went back to her cell.

The magistrate also made some findings with – which reflect a lack of persuasiveness, should I say, concerning this testimony. And a question as to the affidavit which was executed by the plaintiff as differing from other explanations previously made by the plaintiff.

That issue was never really raised, so I am not going to comment on that, but that was another reason.

[69] And the final persuasive reason that the magistrate rejects this October 14th incident is the fact that

during the intervening time between the October 13th incident and the October 14th incident the, um, sheriff, Salazar, was taking reasonable measures to address the risk of harm.

I'll not go into all the measures that were taken. Suffice it to say, he attempted immediately – the report was taken – was given to him and he attempted immediately to take action. It appears that the plaintiff refused to discuss the matter with him on one occasion – on two occasions, I believe, and nothing – he was unable to do anything. Eventually both Gonzales and Martinez were discharged, and I believe, if my recollection serves me, that was on the next day.

I'd also comment that with regard to all the past conduct, and I don't believe I made this clear. If I did, it bears repeating. Regarding all the past conduct as far as Gonzales and these other alleged individuals who were supposedly involved in conduct which made the jail dangerous, it appears clear that Sheriff Salazar took appropriate remedial measures at the time. That, coupled with what he attempted to do with regard to the October 13th and 14th incidents, makes it clear that it was his policy to take appropriate remedial measures when anything was reported to him, including investigation and further disciplinary action where appropriate.

[70] The next real issue is – I think I have discussed this generally, whether or not Salazar took appropriate measures. This starts at page 24 to address the problem. Again, the magistrate observes that its undisputed that he attempted twice to ask the plaintiff questions, once during the morning and again in the afternoon, but on each occasion the plaintiff declined to answer.

The test, as I think I have previously indicated, is not whether he could have or should have acted in a certain manner, and I think this is important, sure, he could have done something different, but that's not the test. The test is as the magistrate concluded, whether failure to so act constituted deliberate indifference.

We have talked about deliberate indifference *ad nauseam*, and I think it's clear that that standard has not been met either in the other assertions by the plaintiff or in this one.

I'll not discuss the application of the PLRA. We did have some – I have reviewed that, and I have reviewed the PLRA and the cases which comment on that issue. If I can find it.

And the main case commenting on that is *Perkins v. Kansas Department of Corrections*. This goes without saying that the PLRA, which is codified at 42 United States Code 1197e(e), a federal action may be brought for mental or emotional injuries suffered while in custody upon a – [71] without – cannot be brought without a prior showing of physical injury, 14 United States Code 1997e(e).

The court in that case, Tenth Circuit, I believe the opinion was authored by Judge Porfilio, held that, although mental and emotional distress can constitute a compensable injury for suits in damages under 18 United States 1983 based upon violation of constitutional rights, this statute, referring to 42 United States Code 1997e(e), provides that such a suit cannot stand unless the plaintiff has suffered physical injury in addition to the mental and emotional harms.

In that case which, as I referred to in colloquy, and inquired of, wearing of a face mask by an inmate who tested positive for HIV, and who was denied certain outdoor exercise and other privileges, it was held that the primary harm the plaintiff alleges is a result of both the denial of exercise and face mask restrictions which causes both his mental and emotional distress. Plaintiff does not allege a physical harm. He claims mental anguish so severe that it has caused his physical condition to deteriorate and hastened his death. Then there is a discussion in footnote 6, and I will not review it at length, which concludes basically that claim for compensatory damages is clearly barred in the absence of a showing of physical injury.

And that the plaintiff – the case concludes, the plaintiff may have other remedies such as injunctive relief or [72] other types of relief, but that relief for purely mental matters or mental damages is not appropriate.

The magistrate simply indicates that with – in his opinion, based on the evidence that was presented, and it's obvious he reviewed the evidence, that there was no testimony, and I found none, that during the incident of October 14th the plaintiff suffered any physical – any substantial physical injury. I have reviewed basically what occurred. It was a bumping and attempted kiss, there was apparently an attempt to rub the plaintiff against the defendant Martinez, and the plaintiff then pushed the defendant away, and that was the sum and substance of it.

The magistrate concluded that under those circumstances the plaintiff did not suffer physical injury. I cannot disagree with that conclusion.

That being the case, she is under 42 1997e(e) barred from bringing an action for mental or emotional injuries. There is also – and I will conclude the magistrate's position taken there is also correct.

There is also – the magistrate also addresses municipal liability. I didn't hear a whole lot of argument with respect to that in detail; however, I think it's clear that his conclusion that in order to hold Huerfano County liable, the plaintiffs must show that not only a constitutional violation occurred, but also some municipal liability or custom [73] was the moving force behind the violation.

My recollection was in my years on this bench that the first case that came along on that was the *City of Canton* case some years back, and it's undisputed as to what the municipal policy or custom requirements are. The magistrate quotes a later case, *Meyers v. Oklahoma Board of County Commissioners*. Quotes the facts here, indicating that what the plaintiff's contention was, which seems to bottom on the contention that Salazar was a chief policy maker in the county, and the county commissioners were – then the county, therefore, is bound by policies which Sheriff Salazar implemented.

It appears under the law in Colorado that this is clearly not the case. The sheriff is an independent officer in the scheme of things under Colorado law. The sheriff's department is clearly administered by the sheriff. There is no control by the county under the law.

Under *Bristol v. Board of County Commissioners* at 312 F.3d 1213, the plaintiff who was an employee of one entity may seek to hold another entity liable for discrimination by arguing that two entities constitute a single employer. A single employer asks whether two nominally

separate entities should in fact be treated as an integrated enterprise, which is what apparently we are trying to do here.

That opinion by Judge Lucero clearly concluded that the Colorado – under Colorado law a Board of County [74] Commissioners under the Colorado Constitution is not a joint employer with the sheriff. That the county sheriff is a distinct position separate from the Board of County Commissioners, but the sheriff has exclusive control over the hiring and firing of his employees under C.R.S. 30-10-506. That the right to discharge employees at will are invalid under *Seeley v. Board of County Commissioners.*

Most important, the control terms of conditions of employment relationship is a right to terminate under certain circumstances the, power exclusively vested in the sheriff with respect to their deputies under C.R.S. 30-10-506, and the *Seeley* case.

Because the Board of County Commissioners has no control over the sheriff's employees, the board cannot be liable for the acts of the sheriff's employees. While the sheriff can fire a person at his pleasure, the board cannot fire that person even for good cause. We agree with the Court of Appeals that the sheriff, not the county or the board, has the right of total control over the deputies.

The Colorado case I believe I discussed in colloquy, and that holds correctly. The magistrate in his review indicates the same.

He also quotes the Supreme Court case in *Pembaur v. City of Cincinnati,* that not every decision by municipal officers automatically subjects a municipality to 1983 [75] liability, addressing the sheriff's liability for a decision by

municipal officers. Number one, the sheriff is not a person who would be an appropriate person to make such policy on behalf of the county, and, number two, even assuming he did, there were no evidence of any such decisions which would cause liability. Accordingly, the magistrate concluded there would be no appropriate liability with respect to the municipality.

Again, I will not go through all of the matters that he discussed in his opinion. However, I would conclude in the main that they were well taken.

Concerning the second claim for liability, negligent supervision, I think suffice it to say that the claim, if in fact, as the magistrate I believe states in his opinion, this claim addresses an alleged 1983 claim, which, candidly, I do not believe it does, Supreme Court of the United States – I believe I quoted earlier quotation from *Fahr,* a very old case where the – I think Chief Justice indicated that when we are talking about constitutional matters, we are not talking about tort liability, and I think the cases have held that clearly.

I had a case sometime back where an inmate sued for injuries as a result of falling over a pillow which was inadvertently left on the staircase. Clear negligence case, but I held that in that case with a substantial opinion, and I can't give you the name of the case, after writing a substantial opinion, that this tort liability is – tort [76] liability – constitutional protections rise far above tort liability. The United States Supreme Court so held in *Baker v. McCollan,* 443 U.S. at 137 where in the majority opinion by Justice Rehnquist, he stated, Section 1983 imposes liability for violations of rights protected by the

Constitution, not for the violation of duties of care arising out of tort law.

The magistrate so concluded here. I think that's a correct conclusion. He also indicated that negligent supervision, assuming it was a tort claim in this case, was a claim which was barred under the Colorado governmental immunity act, 24 – Colorado statute 24-10-106 which provides in pertinent part, that a public municipality is immune from all claims which could lie in tort regardless of whether that may not be the type of action or form of relief chosen by the claimant, except as otherwise provided in this section.

Section does provide in subsection B that the operation of a hospital correctional facility, *et cetera* or jail can be an exception. However, the exceptions provided in the statute, magistrate correctly observes, does not apply to plaintiffs who have been convicted of a crime or incarcerated in a facility or jail pursuant to that conviction, and such correctional facility is immune from liability as set forth in Section 12 of that section.

And that's provided for in, I believe, part subsection E, dangerous condition in a jail, *et cetera, et cetera,* shall [77] be construed to prevent a public entity to sovereign immunity from a natural condition – strike that.

Strike that. I don't believe that's correct, the citation.

Magistrate observes that the plaintiff states that this is not a state tort claim, that it's a claim in negligent supervision is a constitutional violation. Under the circumstances here, the magistrate disagrees for the reasons stated, and indicates in his reasoning – he seems to cover everything, I agree with counsel for the defendants, this is

probably one of the most comprehensive opinions I have read recently in this – on this issue, or on any issue for that matter, and I commend Judge Schlatter for his thoroughness.

He goes on, in determining whether or not this claim would lie as a tort to determining, even under the facts here, the claim would not survive, for one reason Martinez was not even hired by Salazar. He was here long, long before Salazar was in his position. He was employed as a lieutenant in the sheriff's department at the time Salazar took office.

He had been there for nineteen years with an unspotted record. Plaintiff – magistrate's observation – has pointed to no facts that would demonstrate that, even assuming that a negligent hiring standard was to be applied here, that hiring official was in possession of any evidence that reflected that Martinez was a person who should not be employed and is likely [78] to inflict any injury such as that inflicted or suffered by the plaintiff – allegedly suffered by the plaintiff.

So the magistrate concludes, to the extent the plaintiff is attempting to allege a state claim for the tort claim would be barred by the CGIA and would not survive summary judgment.

For the reasons stated, and I believe that pretty well addresses the magistrate's recommendation, for the reasons stated, I have reviewed the objections, heard substantial comment by counsel, I would incorporate by reference into this formal opinion all the allegations – or all of the colloquy with counsel. I think we had some very productive discussions.

We have reviewed the matter, the court has reviewed the matter carefully, findings and recommendations, I've made a *de novo* determination and hereby make a *de novo* determination that the recommendation of the magistrate with regard to the matters is appropriate and, accordingly, the recommendation of the magistrate is adopted by the court as its ruling in this case as to the first and second claims.

Summary judgment will be granted on the first and second claims in favor of the defendant John Salazar, Sheriff of Huerfano County, Colorado, and Huerfano County, Colorado defendants. This in no wise affects the third claim which is raised solely against the defendants Martinez and Gonzales, and I am assuming the third claim, since it is strictly against the [79] individuals, is strictly an individual claim, correct?

MR. SOLOT: Yes, your Honor. And I would like to clean up the record if we could the easiest way possible. I suppose we could file a Motion to Dismiss the third claim.

THE COURT: Whatever you wish – you want. That's up to you.

MR. SOLOT: You could make a finding for reason of delay.

MR. BROUGHAM: There is a dangling participle.

THE COURT: Just file whatever you want. If you want to file a motion. The claim is still pending as far as I know.

MR. BROUGHAM: Well, one would think, your Honor, that perhaps you might want to reduce it to judgment.

MR. SOLOT: That's okay.

THE COURT: I can't do that.

MR. BROUGHAM: No, I am talking about him. Because as of now we have –

THE COURT: If he wants to reduce it to judgment. That's why I am saying I am not going to do anything right now with respect to that claim. I believe the one individual was represented at one time. I can't enter a default without notice under the circumstances.

MR. BROUGHAM: I think the representative lawyer withdrew.

THE COURT: Whether he withdrew or not, if he had ever [80] been represented by a lawyer I think I would be ill advised to enter a default so I am not going to enter a default today.

MR. BROUGHAM: No, I am not saying –

THE COURT: Go through the appropriate procedures.

MR. BROUGHAM: We don't have a final order yet. Well, get some money from somebody.

MR. SOLOT: You would require, if we were to reduce the third to judgment, you would require a pretty extensive hearing, wouldn't you, on damages?

THE COURT: If you want to reduce it to judgment, I think you would have to have a damages hearing. I

won't guess on that until I see. It seems to me like these are not liquidated damages, and given they are not liquidated damages, they would not be reduced to judgment without a hearing.

And I, even in the absence of counsel or withdrawn counsel, I still give any defendant an opportunity to have a hearing on damages before I enter any default judgment, so I think you are probably correct in that assumption.

MR. SOLOT: Well, we will figure it out.

THE COURT: Okay. So we still have got a case. Try to do something – I am going to issue just a general order incorporating – my findings, conclusions and so forth as to the magistrate's recommendation by reference rather than an opinion in this matter. Unless there is some strong objection.

MR. BROUGHAM: No, your Honor.

[81] MR. SOLOT: No.

THE COURT: Okay. Thank you, gentlemen. Good arguments.

MR. BROUGHAM: Thank you, your Honor.

MR. SOLOT: Thank you.

THE COURT: Recess.

(Proceedings concluded at 5:00 p.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 26th day of August, 2003.

/s/ Suzanne M. Claar
Suzanne M. Claar, CSR, RPR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-S-1152

THE DEPOSITION OF JOHN G. SALAZAR, 5-2-00

TEREZA GONZALES,

Plaintiff,

vs.

ROBERT MARTINEZ, DOMINICK GONZALES, JOHN SALAZAR, as the Sheriff of Huerfano County, Colorado, and HUERFANO COUNTY, COLORADO,

Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-S-1967

AMANDA GUEL,

Plaintiff,

vs.

HUERFANO COUNTY BOARD OF COUNTY COMMISSIONERS, HUERFANO COUNTY SHERIFF JOHN SALAZAR, DOMINICK GONZALES, AND ROBERT MARTINEZ,

Defendants.

PURSUANT TO NOTICE and AGREEMENT, the deposition of JOHN G. SALAZAR was taken, on behalf of the Plaintiffs, pursuant to the Federal Rules of Civil Procedure, at 500 South Albert, Walsenburg, Colorado, commencing at

10:45 a.m. on May 2, 2000, reported by Carol Specht-Komma, Certified Shorthand Reporter and Notary Public for the State of Colorado.

* * *

[6] A I'm starting my four-and-a-half years, second term.

Q Is this an elected position?

A Yes, it is.

Q And it's an elected position, you're elected for – what is your term?

A Four years.

Q So I take it you ran for election twice?

A Yes.

Q And when was the last election?

A It was in 1998, '98, to be elected into '99.

Q Would that have been November of '98?

A Nine, '99.

Q '99. What is your educational background?

A Do you want me to start from grade school?

Q No. You can go from high school.

A From high school, I didn't complete high school. I went through the 10th grade. I went to Trinidad State Junior College after that and obtained an equivalency certificate. From there on, I went to numerous schoolings, you know, numerous colleges that allowed you to attend. I

got into law enforcement in 1979, started with the Walsenburg Police Department as a patrolman, took numerous classes. I went to [7] CLETA, which is the Colorado Law Enforcement Training Academy, and it was provided by the Pueblo Police Department at that time. I went for approximately 15 weeks, I believe, and got certified as a peace officer in the state of Colorado.

From then on, I took several courses in law enforcement, from basic patrol to civil liability, many issues that deal with law enforcement, and climbed the ranks from corporal on up to Chief of Police, where I left there in 1995, when I was elected Sheriff.

Q Let me just jump back. You were here when we took the deposition of Officer Sergeant Ruiz, were you not?

A Yes.

Q And I explained to him how the deposition worked?

A Yes.

Q Have you had your deposition taken before?

A For this case? For this issue?

Q No, other depositions.

A I've taken other depositions before.

Q So you basically know how it works?

A Yes.

Q Do you have any questions about why we're [8] here?

A Oh, no.

Q You had mentioned special training courses and police work that you have taken. Can you be a little more definitive and state what courses these were, and where you took these courses?

A I've taken – well, it's a basic patrol traffic instructions, driving under the influence courses, intoxilyzer courses, investigative courses for crime scene, crime collection, taken here, that the Department would represent, like the Colorado Bureau of Investigation would come down, or the police department in La Junta, Colorado. I took courses that were presented by the Chiefs of Police Association and the Sheriff's Academy, as far as new sheriffs. I had to take that in December of 1994. I believe they held that up in Denver. And it entailed responsibilities of the sheriff, as far as the paperwork, documents, civil process, warrants, summonses, civil papers, small claims court. I could add more and more. I could keep going. We would be in here for an hour.

Q Did you take courses in detention?

A As far as the jail administration, I don't remember them providing at the time.

[9] Q By "them", who do you mean?

A The schooling that I went to. In general, when I became Sheriff, that was a new perspective for me, as far as a learning issue, to run the jail.

Q And who did you consult with in order to learn how to run a jail?

A The staff that was on the job at the time, that remained here to work under me. One of the main leaders I looked at was Major Martinez.

Q And he had been here for quite some time?

A At least 18 years, I believe.

Q Did you know him before you became sheriff?

A Yes, I did.

Q And how did you know him?

A Contacts at the old jail, which is across the street; and then here, we made arrests through the police department. Not only that, but he's related, I believe, through blood, my wife.

Q In what way is he related?

A He is my wife's uncle.

MS. BISSET: I missed the question. How is he related?

MR. SOLOT: His wife is –

MS. BISSET: This is to Robert [10] Martinez?

MR. SOLOT: His wife is a niece of Major Martinez.

MS. BISSET: Thank you.

Q (By Mr. Solot) And did you socialize with Major Martinez, Robert Martinez?

A I could probably tell you, maybe, on – it depends on how your socialization is. It's broad, but I could say on a personal – maybe on three occasions, we did go out.

Q Did you meet with him on family gatherings, and things of that occasion?

A That's what I meant. That's what I just said.

MR. BROUGHAM: Wait until he finishes.

Q (By Mr. Solot) Yeah. You have to wait.

A Oh.

Q Three occasions over what span of time?

A Three years.

Q And what years would those have been?

A About '95, '96 and '97, I believe.

Q Now, so it is a fair statement to say the family was not that close?

A I would agree. That's true.

Q Could you briefly – when you became [11] Sheriff, what year would that have been?

A I took office January 10th of 1995.

Q January 10th of 1995. Can you give us a breakdown of the organizational chart of the Sheriff's Department at that time? In fact, if you could, maybe we could, if you could draw the basic organizational chart on a piece of paper.

MR. BROUGHAM: Let's go off the record.

Q (By Mr. Solot) This is 1995?

A Yes.

MR. BROUGHAM: Don't talk while you're doing it. Just draw. Then he'll ask you questions about it. Otherwise, we get a very jumbled record.

A I don't know if you can read my printing.

Q (By Mr. Solot) Maybe we should mark it "1995". Okay. So I understand this, we had the Sheriff, and that would have been yourself, in 1995?

A That was prior to January 10th. I mean, that was the organization when I first walked through this door.

Q Okay. And there was an undersheriff at that time –

A Yes.

Q – when you walked through the door? And [12] who was that?

A I believe his name was Cecil Martinez – Tony Martinez.

Q And was that an appointed position at that time?

A By the sheriff, I believe, yes.

Q Then extending out to the right, you have Captain Patrol. What does that signify?

A That at that time, there was a ranking of chain of command, I believe there was a captain, then a sergeant below him. And they ran the Patrol Division, or Patrol Section.

Q So the patrol officers would have been under –

A The sergeant, yeah.

Q Then extending to the left, you had Jail Administration?

A Yes.

Q Or is that Jail Administrator?

A Administrator.

Q Who was that at the time that you walked through the door in 1995?

A Robert Martinez.

Q And what rank did he hold at that time?

A Lieutenant. Yes, I believe it was a [13] lieutenant.

Q And underneath him was a sergeant. Who was the sergeant at that time?

A John Hurtado.

Q Let me jump back. Who was Captain of Patrol, Patrol Captain?

A Michael Valdez.

Q Who was the Patrol sergeant?

A That was David McCain and Charles Martinez.

Q You had two sergeants?

A Yes.

Q And did that change after you took command?

A Yes, it did.

Q Okay. And do you recall when it changed?

A On the first day that I took over office, there was no more undersheriff.

Q Okay. So then could you draw that chain of command?

A There's a correction on that first one. There should be two captains.

Q Okay. You might put that on there. Put a two there.

Okay. Could we put – just say after you [14] took over.

A Okay.

Q I almost hate to ask this question. What happened to the undersheriff?

A He was fired.

Q Okay. Then did anyone else become a sergeant when you took over, or did it remain the same?

A It remained the same. And through the duration, as of up to today, there's been an elimination of the two bottom sections. I'm sorry, the second one, corporal position.

Q And do you recall who the corporal was when you took over?

A I believe his name was Ronald Hammond.

Q Was Dominick Gonzales on board at that time?

A No.

Q When did he come to work for the department?

A I may have to check records, but it could have been in 1997. No, '96, possibly.

Q Was he your son-in-law at that time?

A Yes.

Q And let me ask you this, is he still your [15] son-in-law?

A Yes, he is.

Q At the time that you took over, and I believe your Jail Administrator was Lieutenant Martinez, what were his duties at that time?

A His duties were comprised of overseeing the operation of the jail, that was from monitoring all the employees' paperwork, the booking process, the control room, the security of the jail, meals, medical and reporting any issues directly to me. I was his direct supervisor.

Q And was there, at that time, was there one captain who had that comparable position in the – what is that called, the Road Division?

A To answer your first question, no, none of the Patrol Supervisors or deputies would oversee any of the staff in the jail.

Q No. I misspoke if that's what I said. Of these two Patrol Captains, was there one who basically reported directly to you and was in charge of the Patrol function, or did they do that together?

A There was two separate captains, because one was delegated for what we call a substation in the Gardner area. That's 25 miles northwest of here. So that captain, essentially, was a sole individual [16] up there. The other captain was stationed here in the Walsenburg area, and he would oversee the Patrol Section.

Q Basically, what were his duties?

A As the captain, it was to oversee equipment, training, vehicle schooling, and the normal operators of the department.

Q And did you have – did you have staff meetings, on a regular basis, with your Jail Administrator and your Patrol Captains?

A When I first came into office, we had a full-blown staff meeting, but not together. It was two separate sections, the patrol side and the jail. And we went over briefly, what, in essence, I had to learn, in essence, for the jail. The patrol side, I was pretty well versed on that already as to what I needed to do, and shared with my department staff what my wishes were, as to how the operation should be.

Q Let's say the first year that you became Sheriff, how often would you meet with Robert Martinez? Would that be on a daily basis?

A We would see each other, practically, on a daily basis – well, on Monday through Friday. Not on weekends, because I wasn't here or he wasn't here.

[17] But it was just the casual meeting in the hallway or, "How is the day starting out?" It wasn't sitting down and discussing issues.

Q How often in the first year that you were Sheriff, did you sit down and discuss issues?

A I would say the first couple months.

Q Now, do you recall how, after you arrived Robert Martinez moved up in rank? Do you recall how that took place?

A We did an on-site visit in Alamosa, because this jail was built on their blueprints. So we went up there to tour it, to see if there were any modifications or additions we would have to do to our facility. And he and I and, as a matter of fact, I believe it was one of the Detention staff, we went up there, and we talked to a Major – I forgot his name, but he was the major and undersheriff of the Alamosa Sheriff. And the title seemed to hit Robert, so he did ask and see if he could have the title. I told him, "Well, you could, but there's probably no pay with it." So he accepted that title.

Q So it was a title without pay?

A Yes.

Q And when did that take place? Do you recall?

* * *

[34] evaluations are for, probably, '96 and '97 and '98?

A Probably sitting on my desk.

Q Could we, do you think it would be –

A Probably.

Q Do you think, at a break, it would be possible for us to obtain those?

A Oh, definitely. That's what I'm saying, if anything, there's one. Because we didn't get into the in-depth – what have we got here, four months, three months? I think it was on annual. could have been an annual evaluation.

Q So with the consent of your attorney, we could produce those at a break?

MR. BROUGHAM: If they exist.

A If they exist. Yeah, I can look.

Q (By Mr. Solot) Now, in October of 1997, Dominick Gonzales was investigated for bringing inmates into the control room, also for having contraband in the control room, namely, alcohol, and, also, he was accused of exposing himself to female inmates; is that correct?

A Yes.

Q Let me go back. How many places do you keep employee personnel records?

A How many places?

[35] Q Yeah.

A I try to keep them in one spot. If it isn't transferred to my office, then from there, into the employee's file.

Q So, really, it should be in the employee's personnel file; is that correct?

A That's correct.

Q So theoretically, what I received in discovery should have been a complete file?

A Yes.

Q There's no real reason for it to have been out of the file?

A The only reason it would be out of the file is because I didn't put it in there.

Q But you mentioned, "It's probably sitting on my desk." That's what I'm trying to clarify. What would?

A I'll share with you, I have a tendency to carry a lot of paper work with me and set it down. As I shuffle through lot of paperwork, it gets piled up. It's probably sitting there, probably.

Q From 1996 and '97?

A If you would like to look at the office, I will show you my office.

Q Okay. Anyway, so you're aware of these [36] investigations that took place in August and October of 1997, relative to Dominick Gonzales; is that correct?

A That's correct.

Q At the time of these investigations and allegations, is it not correct that Robert Martinez was Dominick Gonzales' direct supervisor?

A That's correct.

Q What discussions did Robert Martinez have with you concerning these allegations made against Dominick Gonzales?

A He was concerned about the allegations, but he didn't want to take the step forward to investigate, so I assigned a Sergeant Mike Zudar.

Q Didn't that seem a little odd to you that the direct supervisor, the chief law enforcement officer of the Jail Division, did not want to take charge and investigate his second in command?

MR. BROUGHAM: Object to form.

A Yes.

Q (By Mr. Solot) Did that place you on notice that, perhaps, there was a problem with your Jail Supervisor?

A As a commander, yes.

Q And what steps, if any, did you take to [37] look into that?

A The steps I had is, I brought him into the office, I had a discussion with him to specify how he was going to proceed with any future cases.

Q Now, it's been explained to us that there are two detention officers on duty at all times in the Detention Division, the Jail Division?

A Yes.

Q And in August and October of 1997, at the time of these allegations that were made against Dominick Gonzales, those two officers were Dominick Gonzales and Robert Martinez; is that correct?

A Yes.

Q Did that not place you on notice that, perhaps, something bore looking into and investigating, concerning Major Martinez?

A No.

Q And why do you say that?

A At the time, I think there was no reason to at the time.

Q Now, during this period of time, Dominick Gonzales was also arrested in Pueblo, was he not?

A Yes.

Q And those were serious charges in Pueblo, were they not?

* * *

[46] A October 10th, 1997, at 11:00 o'clock p.m. when these allegations arose?

A I don't have an answer to that. I would have to look in the schedule.

Q Could it well have been Robert Martinez?

A No.

Q Now, two other women verified Ms. Flecksteiner's report. One was Barbara Garcia and Josette Montez. Are you aware of that?

A I believe so.

Q And did you have reason to disbelieve them?

A Yes.

Q Why? Why would that be?

A The majority of the inmates that we have in our facility would conjure up and work with other inmates to disbelieve – or discredit one officer, because they are strict on rules.

Q Sheriff Salazar, is it not a fact that as the chief law enforcement officer in this county that you had a duty to give substance to any allegations that were made by inmates in the jail, under your command?

MR. BROUGHAM: Object to form.

A I believe that's why you have a report in [47] your file there.

MR. BROUGHAM: I notice it's about five or ten after noon. Do you want to keep on rolling, or do you want to break? Because we're obviously not going to finish, especially with the long-winded Ms. Bisset following you.

MS. BISSET: It's very true. It will take hours.

MR. BROUGHAM: Do you want to take a break for lunch?

MR. SOLOT: Let me ask one more question.

Q (By Mr. Solot) Why didn't you have Dominick Gonzales take a polygraph test back in 1997?

MR. BROUGHAM: Object to form. Object to an issue of law.

A I have no confidence in polygraphs.

Q (By Mr. Solot) Is it not a fact that when your deputies, when they hire on, they consent to taking a polygraph?

A Oh, definitely.

Q But you, personally, had no confidence? That's why you didn't give them?

A To anybody.

MR. SOLOT: Okay. We'll break.

[48] (Whereupon, a lunch recess was taken from 12:06 to 1:10 p.m.)

Q (By Mr. Solot) Sheriff, let me ask you this, did not Robert Martinez have the power to go ahead and fire Dominick Gonzales when all this came up?

A No.

Q Why is that?

A I don't believe I gave him, or anybody else, the authority to hire and fire, because that's mine.

Q That was your sole authority?

A Authority, yes.

Q Did you ever – in 1997, did you ever question Robert Martinez on how all these allegations could come up under his command?

A No.

Q And why not?

A Well, when it was – when the allegations came up, I delegated my supervisor, Investigator Sergeant Paul Zudar, to investigate the allegation itself, because he has the experience investigating numerous cases. I had a little more confidence in the sergeant to clarify it.

Q I'm going to hand you Exhibit 7 and ask [49] you to identify that document.

A It's a Huerfano County Sheriff's Office Incident Report form.

Q And who is Dana L. Montoya?

A She's a female Detention Officer, sergeant at the time of – I guess the dates are October 14th of '97.

Q Okay. So – and what was the – now, she reported that – this is an Incident Report which she initiated; is that correct?

A Yes, according to the content.

Q What does R.P. stand for?

A Reporting party.

Q Okay. And in this case, Sergeant Montoya is stating that Robert Martinez and herself were advised on an incident a previous night, involving certain female inmates; is that correct?

A That's correct.

Q Is that the same as the witness statement – is this the same incident as the witness statement signed by Rebecca Flecksteiner?

A Yes, it is. It's the same party.

Q Okay. Now, apparently, in this particular description of what occurred, it said that Dominick Gonzales exposed himself; is that correct?

[50] A Yes, in the content of the report.

Q And there's an allegation that an offer of sexual relationship with the inmates was made by Dominick Gonzales?

A In Sergeant Montoya's statement, yes.

Q Okay. This actually – these allegations contained in this Incident Report are different than that which was contained in Exhibit 6, are they not?

A Excuse me, you said the same?

Q No. The incidents, as described, are different, because Sergeant Montoya's representation of the allegations goes even further than the Witness Statement of Rebecca Flecksteiner; is that not correct?

A I believe that's correct.

Q Okay. And what did you do as a result of this particular Incident Report?

A This Incident Report is in conjunction with the statement under investigative case HSO-383-97.

Q Okay. So did you have the same response in having read this Incident Report as you did to having read the Exhibit 6, the Witness Statement? In other words, you didn't give much credence to it?

A Correct.

[51] MR. BROUGHAM: Object to form. Your question was, what did you do – I object to form – then you compounded it with, you didn't give much credence to it.

MR. SOLOT: I'll try to uncompound it.

MR. BROUGHAM: And it's asked and answered. You've been over what he said with respect to this accusation, anyway.

Q (By Mr. Solot) Okay. Who is Sergeant Zudar?

A He is an employee that started, I believe, just right after I got in office. He came with me from across the street, the police department.

Q So he was, in effect, your handpicked man?

A Yes.

Q And so you brought him with you into this department?

A Yes.

Q And what was his position?

A He was hired on as a deputy sheriff.

Q Was he made a sergeant?

A Yes.

Q Immediately?

A No. It occurred after the command change, I believe, when we started eliminating captains' [52] positions and we started creating sergeants' positions.

Q I just want to go back to Exhibit 7. Is it your testimony that the fact that the allegations in Exhibit 7 were that Dominick Gonzales exposed himself in the jail to female inmates did not concern you at all?

A Oh, definitely, it did, the idea that these statements were derived out of an investigation that Sergeant Zudar investigated. And I based his – my decision as to reprimands, demotions, or what have you, at that time, on his investigation.

Q Did Exhibit 7 did not alert you that there may be a problem at the jail?

A It did amongst, possibly, some of the staff. Because this statement is derived out of a Sergeant Montoya. That's based on her words.

Q And didn't this directly affect the chief law enforcement officer at the jail, Robert Martinez, who was running the show over there?

MR. BROUGHAM: Object to form. Do you understand the question?

A I don't believe I do. Will you ask it –

Q (By Mr. Solot) These allegations would involve Robert Martinez, to the extent that he was [53] the chief law enforcement officer in the jail?

A There's some concern there. But I believe because I delegated an investigator with more experience, more knowledge, to get an outcome of the case, or the investigation.

Q What was Sergeant Zudar's role in the investigation?

A His was to come back and talk to these individuals that are making the allegations, investigate their backgrounds, speak to any available officer that has knowledge of it, Detention Officer, and conclude whether there was a founded issue or nonfounded and refer back to me.

Q Did Sergeant Zudar express any concern to you that these allegations and these events were taking place under Major Martinez' command?

A He never – we never discussed that.

Q Is it not a fact that Major Martinez was the officer on duty at the time of these allegations, together with Dominick Gonzales?

MR. BROUGHAM: Object to form.

A I do not believe so. Because Robert Martinez worked a strict day shift, 8:00 to 4:00, Monday through Friday.

Q (By Mr. Solot) Did you ever, as a result

* * *

[58] A It's Rae Berger.

Q We had a hyphenated name in there.

A She was running – her actual name was Rae Devan Berger.

Q I was saying Devan-Berger. Was she related, in any way, to Cory Berger?

A They were husband and wife.

Q Is Cory Berger still employed?

A No.

Q How did it come to pass that he left?

A They both left at the same time. They both got hired somewhere else.

Q Who assigned personnel to the control room shifts?

A Actually, it's a cooperative agreement with the staff who was working, the two officers. They both, usually, in general, are there together with the exception of a booking process. Then they kind of shift each other. One will do this booking, the next one will do the other booking. So they're usually both in the control room.

Q Okay. Dominick Gonzales and Robert Martinez, they worked a lot together, did they not?

A I don't believe they did. The only reason I say that is because when Dominick Gonzales was on [59] here, he was subjected to a rotational shift, which was days, 8:00 to 4:00; 4:00 to 12:00 evenings; graveyard, midnight 'till 8:00. The only time they worked together was when he got on days.

Q And that was true, he was rotational all during his tenure here?

MR. BROUGHAM: If you know what he's talking about.

Q (By Mr. Solot) Was he rotational?

A Dominick?

Q Yeah, during the time he was an officer here.

A As far as I can remember, yes.

Q I'm going to hand you Deposition Exhibit 8 and ask you what that is?

A It's a Huerfano County Sheriff's Office Incident Report.

Q Okay. And was this reported to you by Officer Ruiz?

A It may have been.

Q Well, I believe he testified, and you can correct me –

A I think he said he did.

Q This took place August 10th of 1997; is that correct?

[60] A I believe it did, yes.

Q And this preceded, by some two months, the other allegations against Dominick Gonzales; is that correct?

A Yes.

Q And when this was reported to you, did this serve as notice to you that there was a problem at the jail facility?

A Yeah.

Q And it would be a real problem?

A Definitely.

Q And correct me if I'm wrong, but was not this incident the incident in which Sergeant Zudar issued the – that Gonzales was reprimanded for?

A Correct.

Q Why wasn't he fired?

A I went based on the recommendation of Sergeant Zudar's investigation.

Q I mean, this is a pretty flagrant violation of procedures and manual and – is it not?

A Yes, it is. As I said, my position is, I have confidence in my investigator. That's why I placed him in that position. Based on his recommendations, I go with whatever disciplinary actions need to be taken.

[61] Q You terminated Ms. Vigil, didn't you?

A Sure.

Q Was Sergeant Zudar involved in that investigation?

A Yes.

MR. BROUGHAM: Asked and answered.

Q (By Mr. Solot) Now, having known the August 10th, 1997, incident, wouldn't that have alerted you, when, in October of 1997, some two months later, there were other serious allegations made against Dominick Gonzales? Shouldn't that have given more credence to the second allegations?

MR. BROUGHAM: Object to form, argumantative.

A I don't believe so, because each case has to be investigated thoroughly on a case-by-case basis.

Q (By Mr. Solot) Now, so it's your testimony that if you combined the August incident, in 1997, with the other incidents in 1997, and let's include in that the Pueblo incident, that you were not alerted that you had a real problem at your jail?

MR. BROUGHAM: You've asked this question about 30 times, Ray. Asked and answered.

Q (By Mr. Solot) You can answer it.

[62] A Yes.

Q What safeguards and steps did you take because of this?

A I also utilized Sergeant Zudar as not only the investigator, but he's also the training officer. And we would, in our general meetings that we had, or that we still have, or staff meetings, we go back and do practicals, we go back and give instruction on what the Detention Officer should be aware of and what to watch for in any given type of incident. My firm belief that I have with it, that I share with my staff, is the fact that I have a high moral and ethical obligation, not only to the constituents, but myself. And I expect them to adhere to the same issue. And if they've got inmates in custody, although they've been through the system, they're in here for a reason, they are to respect them no matter what. You can't degrade anybody for, more or less, what they are or why they're here.

Q But also, I believe, as Sergeant Ruiz said, one of his major functions is to protect the prisoners that are in this jail facility; is that correct?

A That's correct.

Q But can you, just setting alcohol aside, [63] setting sexual allegations aside, the mere fact that inmates are in the control room and know how to operate the controls, isn't that – isn't that just a clear violation of protecting the other prisoners?

A Yes.

Q Did you ever discuss this with Robert Martinez?

A Yes, I did.

Q And what did he have to say about it?

A He would pass it on to the detention staff about security, security reasons. Nobody should be allowed to be out of their cells – or pods.

Q Did you express any discontent with the way he was running the jail facility?

A I did at the time I spoke to him, as the Sheriff to the Jail Administrator, that I felt that it should be his responsibility to enhance the security and follow through.

Q I'm going to hand you what has been marked as Deposition Exhibit 9 and ask you to identify that.

A It's a Huerfano County Sheriff's Office Incident Report.

Q And what did this involve?

A It involved Dominick Gonzales in the control room, and it states that he was allowing [64] inmates to go into the control room.

Q And this is something different than the allegations, or the incident of which you were made aware by Sergeant Ruiz; is that correct?

A That's correct.

Q Did this take place before or after that?

A It's probably after, 'cause it's dated 10-17 of '97, by Sergeant Zudar.

Q Perhaps you can explain, which one of these incidents, of letting the inmates run the control room, was Sergeant Gonzales reprimanded for?

A I believe it was a combination of all the cases. Because it still reflects HSO-383-97.

MR. BROUGHAM: Let me object to the form of the question. You keep saying "reprimanded". That's not all that happened to him. You're misstating the evidence.

Q (By Mr. Solot) Do you know who was in the control room with Dominick Gonzales, or no duty with Dominick Gonzales, at the time of this incident?

A No.

Q Let me hand you what has been marked as deposition Exhibit 10 and ask you to identify that document.

A This document is authored by Sergeant Paul [65] Zudar. It's a written warning for violation of department policy, directed to Dominick Gonzales.

Q And what – strike that. It says, "During the course of an internal investigation on Detention Officer Gonzales for violation of department policy, it was proven that certain policies," and that's plural, "had been violated."

Did you know what policies had been violated by Detention Officer Gonzales?

A I couldn't answer that without seeing the report.

Q And so, in this – this is a disciplinary action notice, and in here, it says that the other allegations which were brought against Detention Officer Gonzales, and which are documented in the case, cannot, basically, cannot be substantiated; is that correct?

A That's correct.

Q And you concurred in this?

A Yes, I did.

Q And so what Detention Officer Gonzales got out of all of these allegations was a written letter of reprimand to be placed in his personnel file; is that correct?

A That's not correct.

[66] Q Okay. Tell me how it's not correct.

A In his file, it specifies the other form to this notice that Sergeant Zudar placed, that he was demoted from the rank of sergeant to deputy – or detention. And he was on six months probation. And I believe there's something else in there. I'd have to look at the file.

Q Wait a minute. Wasn't that a result of the Pueblo incident?

A It's a combination, I believe, of these incidents and the Pueblo incident.

Q Not one of these allegations in 6 and Exhibit 7, and Exhibit 8, they don't – and Exhibit 9 – they make no mention of the Pueblo incident, do they?

A I believe the case report does.

MR. BROUGHAM: To cut through it, Ray, if you have the report of October 20th, which is part of the personnel file, it refers to the basis for the recommendations, if that's the next one that you have.

Q (By Mr. Solot) Let me hand you Exhibit 11 and ask you to review that.

MR. BROUGHAM: This isn't the same document I was talking about.

[67] MR. SOLOT: Well, this is –

A This document handed to me as Exhibit 11 is a Huerfano County Sheriff's Department Continuation Follow-Up Report involving Case No. HSO-383-97. It was authorized by Paul Zudar. It's part of the investigation. It's not complete this there.

Q (By Mr. Solot) This is HSO-383-97, is it not?

A It's a Continuation Follow-Up.

Q Yeah. And does it mention, anywhere, anything about the allegations against Detention Officer Gonzales in Pueblo?

A Not on this two-page section, it doesn't indicate it in there.

Q And these – was Ms. Montez, who is mentioned in Exhibit 11, she's one of the inmates that you had difficulty with, as far as her truth and veracity?

A I believe if I said that earlier, I agree.

Q Okay. So in your opinion, Ms. Montez was not someone who could be believed?

A Correct.

Q During all these investigations by Sergeant Zudar, with all the allegations, did Robert [68] Martinez have any role in this, whatsoever, in the investigation?

A I don't' believe he did.

Q Do you know who the other jail personnel were that were arrested with Detention Officer Gonzales in Pueblo?

A I'd have to look at the report.

Q Do you know what happened to them, as far as an investigation and reprimand, and/or dismissal?

A As far as our agency?

Q Yes.

A I believe that was – he was placed on probation.

MR. BROUGHAM: The question was, do you know who else was there with him in Pueblo. Was there another question?

MR. SOLOT: Well, and then he said he couldn't recall.

Q (By Mr. Solot) My other question was, did you know if anything happened to these other officers?

A Oh, I couldn't answer that without looking at the report.

Q Was there an investigation of these other officers as a result of the Pueblo incident?

[69] A I don't think there was other officers.

Q Okay. So as far as you know, there were no other officers involved?

A Correct.

Q I'm going to hand you what has been marked as Deposition Exhibit 13 and ask you if you will identify that document.

A This is a Huerfano County Sheriff's Office Offense Report, page 1 of 2, authored by me.

Q And you state, in here, that, "On October 13th, 1998, at approximately 8:00 o'clock p.m., I, Sheriff John Salazar received a telephone call from Officer Simon Sierra, Detention Division . . . " Is that correct?

A That's correct.

Q Who was Simon Sierra?

A He is another employee that came aboard, I believe, in '97.

Q And who did he report to? Who was his supervisor?

A If it wasn't to one of the sergeants, it would be to me.

Q Well, would he report to Robert Martinez?

A Yes, I stand corrected.

Q And do you know why it was him who [70] contacted you? Is that because he was on shift?

A Simon?

Q Yeah. How did he tell you he found out about all of this?

A He and Officer Berger, Rae, were on duty, the 4:00 to 12:00 shift.

Q On the 4:00 to 12:00 shift?

A Yeah.

Q Okay. And you went to the – you were at home at the time?

A Yes.

Q And you came back here to the jail facility?

A Yes, I did.

Q Then, apparently, you – they told you what the complaint was?

A Yes.

Q And then, apparently, according to your report, "I then instructed Officer Sierra to inform these females that he notified me and that the statements provided would be investigated. I then informed Officer Sierra that I would interview these females in the morning reference their statements." Is that correct?

A That's correct.

[71] Q Well, you knew that both Gonzales and Martinez would be on duty the following morning, did you not?

A Yes, I did.

Q Did you relieve them of duty immediately?

A Not in the morning, I did not.

Q And wasn't it of any concern to you that these two females who made these allegations would be under the command of both Gonzales and Martinez the following morning, on the 14th?

A You said concern? Yes.

Q So what did you do in relation to this concern?

A I knew I would be here at 8:00 o'clock in the morning and confer with these two parties, as far as

getting their documented statements, and initiate an investigation.

Q But, in fact, you did not meet with the two females at 8:00 o'clock the following morning, did you?

A No, I didn't.

Q And you said you assisted deputies on the 14th of October, 1998, you assisted deputies in transporting several male inmates to court, then you say "including Tereza Gonzales". Was she [72] several male inmates?

A That's correct. When we transport, we do not try to combine them together. We keep them separate, in separate vehicles.

Q And it was not until 1:00 o'clock p.m. that you interviewed Amanda Guel; is that correct?

A That's correct.

Q Do you know what transpired between – what time would Martinez and Gonzales have arrived for work?

A 8:00 to 4:00.

Q Do you know what transpired between 8:00 o'clock and 1:00 o'clock?

A I believe when we went to court, Tereza was in court most of the morning.

Q Yeah, but where was Amanda?

A She should have been in the cell.

Q And at this juncture, you had not talked to either – taken any action concerning either Martinez or Gonzales; is that correct?

A That's correct.

Q And I take it you did not talk to Tereza on the way to court; is that correct?

A No, I don't believe anything was said, other than her statement she had. She had a [73] statement.

Q Did you read her statement?

A Not at that point. 'Cause she said she wanted to give it to her attorney, and I said that was fine.

Q You say, here, "At approximately 2:30 to 3:00 o'clock p.m. Tereza did come back where Officer Hibpshman was informed to bring her to the front officer area." In other words, this was back at the jail?

A Yes, here.

Q So what time did she get back to the jail from court?

A I couldn't remember.

Q And so, apparently, you left her here at the jail, without taking any further action against, or to protect tem [sic] ?

A Which one are you talking about?

Q Let's take Tereza Gonzales.

A Okay. 'Cause if I remember correctly, that morning, she went to court. She came back, and then she was taken back up to court and held up there.

Q Are you aware that she was molested on the 14th?

[74] A No.

Q You never found out about that?

A I heard about it through the investigative report, I believe, with CBI. I think they did it.

Q When were Gonzales and Martinez relieved of duty? When?

A I believe it was that next day, on the 15th.

Q Knowing all you knew from previous allegations and previous reprimands, weren't you placed on notice that there was a real problem in the jail?

A My immediate action was to take care of this case here at that time. I didn't think about the other issues. This was the important thing.

MR. BROUGHAM: You are referring to Exhibit 13, the record should reflect, and the second page of Exhibit 13.

Q (By Mr. Solot) What action did you take, at 8:00 o'clock at night, on October 13, 1997, when you were informed of this, of the incidents which took place, to protect both Amanda Guel and Tereza Gonzales?

A At 8:00 o'clock at night when I first got the report?

[75] Q Yes. What action, if any, did you take?

A I explained to my staff, which was Simon here, and Rae Berger, to make sure they get me the documented information to determine if this allegation needed to be investigated. That's procedural.

Q In other words, as you had testified concerning the previous allegations of sexual misconduct on the part of Dominick Gonzales, you were taking each case on its own,

without looking at other allegations against him that had been made? You were taking each one separately?

A No. I believe I made the decision based on my investigator's recommendation on those cases.

Q All right. So apparently – now, the DA knew about these allegations, right?

A Correct.

Q And they knew about it when Tereza Gonzales first went to court; is that correct, in the morning?

A I believe it was – I guess when their attorneys conferred with the DA.

Q Well, had you heard anything about Amanda Guel calling her grandmother in Texas – or Utah or Texas?

[76] A I think she told me that the next morning, or here somewhere, the afternoon.

Q Okay. Then were these inmates released?

A Yes.

Q Why were they released?

A After conferring with the DA, we felt it was best to not have them in the facility.

Q Let me hand you what has been marked for identification as Exhibit 14 and ask you if you've seen that document?

A No, this is the first time I seen it.

Q You've never seen this document? You took no part in the investigation by the district attorney's office of Martinez and Gonzales?

A No.

Q Now, she says, Dianna Pacheco says that on October 13th, she was advised by the DA's and Victims Officer Richard Justice that a complaint had been made concerning sexual assaults which had occurred at Huerfano County Jail by two of the detention officers. Then she said she went to Huerfano County Law Enforcement Center and interviewed a Melissa Vigil, who was being held at the jail at the time.

Now, is she correct in the October 13th statement, or was that the 14th, or –

[77] MR. BROUGHAM: Well, object to form. I'm not sure how he would know. But if you know –

A I don't.

Q (By Mr. Solot) Did you know, who was Melissa Vigil?

A I believe she was a third female inmate we were probably holding for Trinidad.

Q Had you ever spoken to her?

A No.

Q Okay. It says – so you have no way of verifying this? Down here in the second paragraph it says yesterday, October 13, '98. You've never seen this report before?

A Not that I can remember. I know I can remember the DA being here and, of course, CBI, and the DA being here the evening of the 14th.

Q And at approximately 5:15, on page 2, Ms. Pacheco says that at 5:15, she spoke, her and Agent Sadar met with Sheriff John Salazar. Do you recall that meeting?

A Yes, I do.

Q And they asked to see the commissary?

A Correct.

Q And, apparently, they gathered evidence at that time?

* * *

[146] buzz him into the library?

A If he pushed the button. But Robert Martinez had a key, a manual key.

Q A manual key to the library door?

A Yes.

Q So you don't think Gonzales buzzed him in there? Gonzales would have been in control right?

A Yes.

Q Nobody else?

A Nobody else.

MS. BISSET: I'm not going to ask any more questions now. Thank you.

MR. BROUGHAM: Sheriff, I have some.

MR. SOLOT: Can I just ask him one?

MR. BROUGHAM: No. Go ahead.

FURTHER EXAMINATION

BY MR. SOLOT:

Q We toured this jail facility today, right?

A Yes.

Q I mean, wouldn't it be virtually impossible, with two men on duty, to have gone from Pod-G, past the control room, to the library, to the commissary and back?

A It is now.

Q What was the difference?

[147] MR. BROUGHAM: Had you finished your question?

MR. SOLOT: Yes, that was my question.

Q (By Mr. Solot) It is now. Why wasn't it then?

A Because Robert Martinez had a master key.

Q What I'm talking about, I'm talking about because of the physical space, if you're in the control room, wouldn't you have to see all this? That's what the control room, is for, is it not?

A You should be able to see, from the control room, where we walked through. Back this way, as I showed you, there is invisibility, because there is no camera set up in that hallway.

Q Where would the other officer have to be in order not to see this going on?

A Up here in front.

Q Now –

MR. BROUGHAM: You said one question.

Q (By Mr. Solot) There was no reason for Dominick Gonzales to be up here in front, was there, on October 13th, 1998?

A I can't answer that. 'Cause I think, as you saw today, we had an officer up here in front, dealing with people in front. So they do have to [148] leave that area to come up here.

MR. SOLOT: I have no further questions.

EXAMINATION

BY MR. BROUGHAM:

Q Sheriff Salazar, before October 14th, 1998, did you have any documented, verified, sustained evidence presented to you that Dominick Gonzales had ever sexually assaulted an inmate in this facility?

A No.

Q I'll ask you the same question about Robert Martinez. Did you have any such information?

A No.

Q Does the Board of County Commissioners of Huerfano County tell you who to hire?

A No.

Q Do they tell you who to fire?

A No.

Q Do they tell you how to supervise your deputies?

A No.

Q With respect to Mr. Solot's last series of questions, other than Robert Martinez, who was on duty from 8:00 to 4:00 on October 13th, 1998, in the [149] detention facility?

A What was that date?

Q October 13th, 1998, the incident – the day the first incident happened between the two Plaintiffs in this case – involving the two Plaintiffs?

A Just – I believe it was Robert Martinez and Dominick.

Q They were the only two on duty?

A Yeah.

Q With respect to the Pueblo incident – and I'm not talking about sinking the ship in the Korean Sea, for those of you who are old enough to remember – as a result of receiving information concerning this Pueblo confrontation or incident leading to charges against Dominick Gonzales, you assigned Sergeant Zudar to investigate that?

A That's correct.

Q As a result of his investigation, it's my understanding that – and I believe you testified to part of this – Dominick Gonzales was demoted from sergeant to Detention Officer?

A That's correct.

Q And he was also suspended for a period of time?

[150] A Yes.

Q And he was also placed on probation for a period of six months?

A That's correct.

Q Between that date and 1997, when he was suspended and demoted, was he ever promoted again?

A No.

Q So as of October 13th, 1998, Dominick Gonzales was an officer, not a sergeant?

A That's correct.

Q What happened to the Maldonado claim that you were questioned on earlier?

A I don't think anything was ever filed on it. I never received anything.

Q What information was Maldonado's attorney who filed that claim given about the complainant and his mental health?

A I believe when that was filed, he was in the State Hospital, Colorado State Hospital

Q The Claimant, Mr. Maldonado?

A Yes.

Q Is this one of the incidents that, perhaps, forms the basis for your opinion, after five years as Sheriff in

this county, that you would usually believe the officers over the inmates, in [151] terms of claims like this?

A That's correct, with other –

MR. SOLOT: I object to the form of the question; specifically, "claims like this", I don't know what claims you're referring to.

MR. BROUGHAM: The Maldonado claim.

Q (By Mr. Brougham) You essentially concluded that Mr. Maldonado may well not have been telling the truth?

A That's correct.

Q His attorney, apparently, saw enough of that not to follow through with the threatened lawsuit?

MS. BISSET: Objection, calls for speculation.

Q (By Mr. Brougham) Go ahead.

A She agreed with me.

Q That Maldonado probably wasn't telling the truth?

A That's correct.

Q Now, with respect to when you re-initiated the evaluation process for the personnel in your sheriff's office, you said you started again in 1998?

A That's correct.

Q And what year would that evaluation have [152] covered? What work year?

A It would have been '98, I believe, of January to December.

Q Well, you've – when we were looking for the documents concerning the evaluation of Robert Martinez, which you told Mr. Solot might be on your desk, you provided, for me, the evaluation form you talked about in '98, that you started in '98?

A Right.

Q Well –

A Of the documents.

Q What year would that evaluation have covered? It's 1997?

A Yes, I'm sorry. I correct that.

Q So if Robert Martinez and Dominick Gonzales had not been terminated in October of 1998, they would have been evaluated on this form, would they not?

A Yes.

Q On October 14th, 1998, did you contact CBI and ask them to undertake the investigation of the reported incidents that you've been told about?

A Yes, I did. I contacted Lee Roybal with the Pueblo office.

MR. SOLOT: Excuse me, David. May I [153] see that?

MR. BROUGHAM: Sure.

Q (By Mr. Brougham) And on the evening of October 13th, 1998, when you were contacted by Officer Sierra, did you know exactly what happened that day, and what these individuals claimed?

A Not exactly.

Q Had you been given a written statement prepared by Tereza Gonzales?

A No.

Q You testified that when you were taking her to court on the 14th, the next morning, she had such a written statement?

A Yes.

Q Did she show it to you?

A No, it was in her pocket.

Q Did she allow you to read it?

A No.

Q What did she say she was going to do with it?

A She asked me if my staff had notified me in reference to a sexual assault, and I said yes. And she said, "I have a letter in my pocket," and I told her to provide that to her attorney.

Q Her attorney would have been the public

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-S-1152

THE DEPOSITION OF TEREZA M. GONZALES, 5-3-00

TEREZA GONZALES,

Plaintiff,

vs.

ROBERT MARTINEZ, DOMINICK GONZALES, JOHN SALAZAR, as the Sheriff of Huerfano County, Colorado, and HUERFANO COUNTY, COLORADO,

Defendants.

PURSUANT TO NOTICE, the deposition of TEREZA M. GONZALES was taken, on behalf of the Defendants, John Salazar and Huefano [sic] County, pursuant to the Federal Rules of Civil Procedure, at 414 West 9th Street, Pueblo, Colorado, commencing at 9:37 a.m. on May 3, 2000, reported by Carol Specht-Komma, Certified Shorthand Reporter and Notary Public for the State of Colorado.

APPEARANCES

For Tereza Gonzales: RAPHAEL M. SOLOT, ESQ.
501 South Cherry Street
Suite 610
Denver, CO 80246

DAROL C. BIDDLE, ESQ.
323 South Union Avenue
Pueblo, CO 81103

For John Salazar, Huerfano County:
DAVID R. BROUGHAM, ESQ.
HALL & EVANS, L.L.C.
1200 – 17th Street
Suite 1700
Denver, CO 80202

* * *

[118] Q (By Mr. Brougham) You didn't think it was that important?

A Right.

Q Now, then, you also – so you get to court that day. And you've got this public defender there named Martin Stuart; is that correct?

A Yes.

Q And you showed Mr. Stuart Exhibit 1?

A Yes.

Q That was sometime in the morning of the 14th?

A Yes.

Q And then did you – you, apparently, saw Mr. Stuart take Exhibit 1 and show it to the DA?

A Glenn Davis, yes.

Q Yes?

A Yes.

Q All right. The DA was, in your memory, Glenn Davis?

A Yes.

Q He was the actual DA?

A He is the actual.

Q Not a deputy?

A No. He is –

Q He's the head dude?

[119] A Yes.

Q And then, according to Exhibit 2, your public defender, after he showed it to the DA – strike that. After your public defender showed Exhibit 1 to the DA, then you write, "I have to come back, because they did not want me to say nothing in front of the Sheriff's Office"?

A Yes.

Q Is that correct?

A Yes.

Q So when you say, "I have to come back," you mean you had to go back to court?

A Yes.

Q Or you had to go back to the jail?

A After that, they escorted me back to the jail.

Q But you were told, by both the DA and your public defender lawyer, that they did not want you to say anything in front of the Sheriff's Office; is that correct?

A Yes.

Q And you didn't is that correct?

A Yes. I didn't. I didn't say nothing.

Q You didn't say, I don't want to go back to jail"?

[120] A I didn't say that. I just followed the orders.

Q From the DA and the public defender?

A Yes.

Q And when you went back from the court to the jail, who took you back?

A I don't remember. Sheriff Salazar or Zudar did.

Q Somebody from the Sheriff's Office?

A Yes.

Q Did you tell them you didn't want to go back to the jail?

A No. I was really quiet.

Q Did you tell them anything about Major Robert Martinez?

A The DA told me not to say nothing.

Q You didn't say anything – if it was Sheriff Salazar who took you back, you didn't say anything to him about being afraid of Robert Martinez, or not wanting to go back to the jail, or refusing to go back to the jail, nothing of that nature; is that correct?

A Nothing. That's correct.

Q And did you leave your statement with the – did you leave Exhibit 1 with the public defender?

[121] A Yes.

Q So you didn't take it back with you to the jail?

A No.

Q And you went back to the jail for lunch?

A Yes.

Q And after lunch, as you put it on page 16, quote, "Bob calls me in the control room"?

A Yes.

Q And then once again, you refer to him as "Bob", right?

A Yes.

Q Not Major and not Robert, correct?

A Correct.

Q And he says, "Let's start off where we left off yesterday"?

A Yes.

Q He says that to you?

A Yes.

Q And at this point, there's no physical contact between you and him when he says, "Let's start off where we did yesterday"?

A He's grabbing my arm.

Q You don't put that in your statement?

A No, I don't.

[122] Q And you said no, that it was bad; is that right?

A That's right.

Q What happened yesterday was bad, and you didn't want to do anything?

A Yes.

Q You hadn't said that the day before? You hadn't said, "This is bad, I don't want to do it"?

A I said, "I'm scared," the day before. I" want to back to my "pod." I didn't say, "This is bad."

Q All right. You said, quote, "People are watching us," to Bob, when you were in the control room that day; is that right?

A Yes.

MR. SOLOT: Can we clarify what day?

MR. BIDDLE: This is in the control room.

MR. SOLOT: Don't slap it down. I just want to know what day. I want to know.

MR. BROUGHAM: Is that an objection to the form? She seems to understand.

MR. SOLOT: I'm asking for clarification. May I ask for clarification?

MR. BROUGHAM: No. If the witness [123] wants it, she can ask. She seems to understand. Let's get through this.

Q (By Mr. Brougham) You know what day I'm talking about, don't you?

A October 14th.

Q Right. You said you didn't want to do it, it was bad, and you said, "People are watching us"?

A That was a defense. If somebody was watching us.

Q You said, "People are watching us," unquote?

A Yes.

Q And then Martinez –

A – said, "No one is watching."

Q He told, "No one is watching." And he pressed his body up against yours?

A Yes.

Q And he tried to kiss you?

A Yes.

Q And he tried to force your hand, as you put it, to rub his dick with his pants on?

A Yes.

Q And what do you mean by "dick"? His penis?

A Yes.

[124] Q That was your phrase for penis?

A Yes.

MR. SOLOT: It's a lot of people's phrase.

MR. BROUGHAM: Godamnit, Ray. You know, I can't ask her if she's a virgin, you get into that.

MR. BIDDLE: He's worried about you being shocked by all this.

Q (By Mr. Brougham) And at that point, he had his pants on, correct?

A Correct.

Q He didn't have anything unzipped?

A No, he didn't.

Q And you pushed him away and went back to the pod?

A Yes.

Q All right. So there was no touching of your breasts, touching of your vagina?

A He just grabbed my arm.

Q On the 14th?

A On the 14th.

Q And did you go back to the pod?

A Yes.

Q And you, apparently, at that point, you [125] said, "I had already wrote another statement, is that correct?

A Yes.

Q What did you do with this second statement?

A Would you like to see it? I have it.

Q I said, what did you do with it?

A I gave it to Mr. Martinez – I mean, I gave it to my public defender.

Q That was my question, what did you do with it?

A I gave it to my public defender.

Q May I see it?

A Here's my second statement. I have Amanda's statement, too.

Q I've got that. I don't know if I have her second one.

A She just wrote the first one.

THE WITNESS: Did you guys see the second one of my statements?

MR. BIDDLE: I don't know.

THE WITNESS: Really?

Q (By Mr. Brougham) You wrote the second statement – in Exhibit 2, you say, "I had already wrote another statement." You, apparently, wrote the

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99 S 1967

AMANDA GUEL,

Plaintiff,

v.

HUERFANO COUNTY BOARD OF
COUNTY COMMISSIONERS,
HUERFANO COUNTY SHERIFF JOHN SALAZAR,
DOMINICK GONZALES, AND ROBERT MARTINEZ,

Defendants.

AFFIDAVIT OF JOHN SALAZAR

The undersigned, being duly sworn, deposes and states that the following facts are true and based on his personal knowledge:

1. I am the elected Sheriff of Huerfano County, Colorado and was serving in that capacity in 1997 and 1998.

2. In November of 2000, my attorney in this matter sent me a copy of a letter dated April 9, 1998 which is unsigned, but begins with the words "Hi John." The letter in question was apparently sent to Dee Pacheco of the District Attorney's Office for Huerfano County by an individual whose return address identifies her as Dee Tefteller of Farmington, New Mexico.

3. Prior to receiving this letter from my attorney in November of 2000, I had never seen this letter. Additionally, I was never informed by investigator Pacheco of the

District Attorney's Office that she had received such a letter.

4. As I testified in my deposition taken in this matter, before the Plaintiff in this case came forward with accusations against Detention Officers Martinez and Gonzales in October of 1998, I had never received any substantiated information concerning prior sexual improprieties by these Detention Officers.

FURTHER, THE AFFIANT SAYETH NAUGHT:

/s/ John Salazar
JOHN SALAZAR

STATE OF COLORADO)
) ss.
COUNTY OF HUERFANO)

The foregoing instrument was acknowledged before me this 28 day of November, 2000, by John Salazar.

Witness my hand and seal.

/s/ Melanie Pettie
Notary Public

My commission expires: 06-19-03

STATE OF COLORADO THIRD JUDICIAL DISTRICT

COUNTY OF HUERFANO IN THE DISTRICT COURT

INFORMATION

THE PEOPLE OF THE STATE OF COLORADO

Against

ROBERT CONRAD MARTINEZ

GLENN DAVIS, DISTRICT ATTORNEY, in and for the Third Judicial District of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the Court that on or about the 13TH day of October, 1998, at the said County of Huerfano, State of Colorado.

COUNT I: ROBERT CONRAD MARTINEZ, did unlawfully, feloniously and knowingly inflict sexual penetration and sexual intrusion on ■■■■■■[*] who was in custody of law and detained in a hospital and other institution, and ROBERT CONRAD MARTINEZ had supervisory and disciplinary authority over ■■■■■■ and used this position of authority to coerce ■■■■■■ to submit; in violation of C.R.S. 18-3-403(1)(g), SEXUAL ASSAULT IN THE SECOND DEGREE, a Class Four Felony.

[* Information intentionally deleted in original.]

Respectfully submitted,

GLENN DAVIS AR#15956
DISTRICT ATTORNEY

BY: /s/ Glenn Davis
RICHARD G. PATCHEN, JR. AR#18944
DEPUTY DISTRICT ATTORNEY
HUERFANO COUNTY COURTHOUSE
401 MAIN STREET
WALSENBURG, COLORADO 81089
PHONE: (719) 738-1510

DISTRICT COURT, COUNTY OF HUERFANO,
STATE OF COLORADO
Case No. 98 CR 59

JUDGMENT OF CONVICTION: SENTENCE: AND ORDER TO SHERIFF

THE PEOPLE OF THE STATE OF COLORADO vs.
TEREZA MAGDELENA GONZALES,
Defendant.

(Filed Oct. 9, 1998)

On October 9, 1998, the Defendant named above was present in Court for an advisement. The People were represented by Richard Patchen, Deputy District Attorney. The Defendant, during the advisement, verbally insulted the Court. The Court **FINDS** that the misbehavior was intentional and willful and was committed in the Court's presence. In order to preserve the Court's authority, to prevent obstruction of justice, and to vindicate the dignity of the Court, the Court **FINDS** the Defendant in direct Contempt of Court.

It is the Judgment of this Court that the Defendant be sentenced to the Huerfano County Jail for a term of thirty (30) days.

JUDGMENT OF CONVICTION IS NOW ENTERED.

THE COURT finds that the Defendant has spent -0- days in confinement prior to this date for the offense(s) for which the Defendant is being sentenced.

IT IS FURTHER ORDERED OR RECOMMENDED:

THEREFORE, IT IS ORDERED that the Sheriff of Huerfano County shall safely convey the Defendant to the Huerfano County Jail at Walsenburg, Colorado, to be received and kept as provided by law.

10/9/98 Claude J. Appel
Date Judge

xc: Richard Patchen
Martin Stuart (by fax)
Huerfano County Sheriff

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 99-S-1967

THE DEPOSITION OF PAUL J. ZUDAR, 11-29-00

AMANDA GUEL,

Plaintiff,

vs.

HUERFANO COUNTY BOARD OF
COUNTY COMMISSIONERS,
HUERFANO COUNTY SHERIFF JOHN SALAZAR,
DOMINICK GONZALES, AND ROBERT MARTINEZ,

Defendants.

PURSUANT TO NOTICE, the deposition of PAUL J. ZUDAR was taken, on behalf of the Plaintiff, pursuant to the Federal Rules of Civil Procedure, at the Sheraton Hotel, 2886 South Circle, Colorado Springs, Colorado, commencing at 9:25 a.m. on November 29, 2000, reported by Carol Specht-Kozma, Certified Shorthand Reporter and Notary Public for the State of Colorado.

APPEARANCES:

For Amanda Guel: JENNIFER E. BISSET, ESQ.
THE LAW FIRM OF JENNIFER BISSET
1120 Lincoln Street
Suite 1001
Denver, CO 80203

DAVID S. HOOVER, ESQ.
THE HOOVER LAW FIRM
2145 Kipling Street
Lakewood, CO 80215

For John Salazar, Huerfano County, and Huerfano Board of County Commissioners:
DAVID R. BROUGHAM, ESQ.
HALL & EVANS, L.L.C.
1200 – 17th Street
Suite 1700
Denver, CO 80202

* * *

[14] try and determine whether you [illegible] charge someone with a sexual assault or not?

A Well, I'll take and try and push them, to see if I can get them to slip up somewhere in a statement that they've made, look over my notes that I've taken, maybe re-ask a question, or something, to see if, you know, they answer differently, or something like that.

If it comes down to where I have – you know, I believe maybe this person to do this, but I'm not sure if we have enough evidence to actually prosecute it, I'll go and meet with the District Attorney and get his opinion, you know, present to him what I have, sit down with him and say, "This is what the victim said, this is what, maybe, a witness said, this is, maybe, the physical evidence I have, and this is what the accused is saying. I believe he done it. Now," you know, "look at the case. If you think – is there something more I could do? Is there – do we have enough to go ahead and file charges now? Or do we wait for some time down the line when some new evidence comes in, you know, somebody else comes forward, or something else comes up?" You know, "Do we hold off?" I'll take that route if I'm not sure, myself, to charge somebody.

[15] Q Will you also go to a supervisor? Would you talk about it with John Salazar, say, "I've got this case I'm looking at"?

A I have asked him about cases in the past, sure. He's been in law enforcement longer than I have. So on occasion, I have went to him and asked him for his opinion on different cases that I've worked.

Q Do you recall being asked, by Sheriff Salazar, in October, 1997, to investigate a complaint about Dominick Gonzales appearing before female inmates with his pants dropped?

A Actually, that case came up when – that case and the Pueblo case came up right about the same time. And Sheriff Salazar was away at a conference, or something that he had to go to. He was informed of it, and I did initiate an investigation on it.

Q Did he ask you to do that?

A If I recall right, I started the investigation and informed him of it, of what was going on, and – and he probably did tell me to proceed, or something like that, with it. I can't remember exact words of conversations.

Q All right. Well, let's start with the first incident. Let me ask you a different question. [16] Do you know [illegible] Dominick Gonzales began working for the Sheriff's Department?

A Not without looking at his file, no, I don't know the exact date that he came on.

Q Was he working there when you started?

A When I started? No, ma'am.

Q Do you know if he was hired in 1996?

A It was either '96 or '97. I don't know which year.

Q Did you have any interaction with Dominick Gonzales when he first started working at the department?

A As in what, ma'am?

Q Any kind of contact with him, that you would have formulated an impression of his character?

A Well, I would see him when – let's see, at that time, I believe I was on a straight schedule of days, Monday through Friday, 8:00 to 4:00. So I would only see him when – if he was working day shift or, maybe, when he was working a graveyard and going off shift, or coming in on an evening shift. Unless he was working days, you know, I would just see him in passing.

Q Did you formulate an impression of him in those moments?

[17] A As to what?

Q His character.

A I guess.

Q What was your impression?

A Well, Dominick appeared to be a person who was always in a good mood, joking around. He done his job. He would volunteer to cover shifts when other detention officers would call off sick, or something like that. He seemed, you know, enthused about working there, an energetic type employee.

Q Before this incident that happened in Pueblo, had you heard any complaints about Dominick Gonzales' performance on the job?

A No.

Q Had you heard any complaints from inmates?

A Before the incident in Pueblo?

Q Exactly.

A Well, the incident that – of the allegations of the dropping his pants, whatever you're talking about, I think, occurred a couple days before I found out about the – I would have to look at the reports to see the exact dates, but I believe that one happened a day or two, or even that same day that I found out about the Pueblo incident. It was right close there, a couple days between the two.

* * *

[26] A Yes.

Q And who?

A Cheryl Vigil.

Q Anyone else? Was there somebody fired for violating a domestic violence or domestic restraining order?

A We had a road deputy who, he was a captain, and he was involved with a domestic situation, with his wife, and was demoted from the rank of Captain to Deputy by the Sheriff. I didn't have any dealings with that, though.

Q Okay.

A Other than when he was – after he had been demoted, I remember having a meeting with him, because

he was calling in sick a lot. And I met with him about calling in sick and not showing up for work.

Q Were you involved in Miguel Duran's termination of employment?

A No. That took place before I came to the Sheriff's Department.

Q Were you involved in any other terminations besides Cheryl Vigil?

A I sat in on a meeting with an employee by the name of David Shane, but that was the Sheriff's [27] doing. I wasn't involved in any investigation, or anything like that, of that incident.

Q What was David Shane fired for?

A Having a relationship with a victim, a female, who we – our patrol division had arrested her husband for domestic violence charges.

Q Why was he fired for that?

A The case was still ongoing and in the court system, and, somehow, he became involved with her. I don't know exactly how. And he took one of the department vehicles to her residence at Christmas, something like that, to deliver presents, or something like that. And the Sheriff had told him that wasn't to happen, you know, you're not to do that. So he was – you would have to ask the Sheriff exactly why he terminated him. But I believe that's why.

Q Do you have any idea why he wasn't given, like, a written warning, or put on suspension or probation?

A That was the Sheriff's doing, ma'am.

Q Did he have any other disciplinary action against him at the time that he was terminated?

A Not to my knowledge.

Q All right. So you investigated this [28] incident in Pueblo with Dominick Gonzales?

A Yes.

Q What was the reason you didn't recommend that he be terminated?

A Well, it was the first incident that he was involved in this type of situation, you know. Everybody makes a mistake. And I felt that if he was demoted, put on probation, received, you know, whatever it was, unspecified days there of unpaid, you know, not receiving pay for whatever time it was, that that would correct his behavior and bring him to light that, you know, you don't do this, because there are consequences, even if you do it off the job.

Q Well, wasn't part of the problem with Gonzales' behavior of Pueblo his abuse of his feeling of authority?

MR. BROUGHAM: Object to form.

Q (By Ms. Bisset) Isn't that part of what concerned you, that he was saying, "Hey, I'm an officer in another community. Don't touch me"?

A Well, that bothered me, because he's not an officer.

Q So he didn't tell the truth?

A Right. He wasn't an officer. He's not a [29] certified officer. He never was.

Q Wasn't part of the problem here, though, his assertion of his authority in another jurisdiction as a reason why he shouldn't be arrested?

A Yeah, I guess he was trying to use, maybe, his position of a Detention Officer as leverage to not – you know, to get out of a situation that him and his friends had gotten into.

Q What's the next incident that you investigated pertaining to Dominick Gonzales?

A Well, this one, the Pueblo incident, and the alleged misconduct by him in the female pod came in about the same time. So I was kind of doing both. Those are the two incidents that I investigated.

Q This incident with the female pod, how did that come to your attention?

A That came to my attention through Dana Montoya.

Q What did she tell you?

A She told me that Robert Martinez, who was a major, received something, information from a female inmate about Dominick in the female pods.

Q And what did you do in response to that complaint?

[30] A I instructed Dana Montoya to get statements from the females that were alleging this incident occurred.

Q And did she do that?

A I believe she did.

Q And were those statements presented to you?

A Yes, they were.

Q And who gave the statements?

A Rebecca Flecksteiner and Josette Montez.

Q Did you talk with them yourself?

A Yeah, after they finished their statements, I talked to them.

Q What did they tell you?

A Basically, the same thing they put in their statements, that Dominick had come in and undid his belt and dropped his pants for anyone to fondle him, or things like that. Rebecca talked about being hassled by Dominick and women flashing their breasts at the camera for coffee, and things of that nature, is what she told me.

Q What was her demeanor when she was telling you these things?

A I took – to me, she was a little apprehensive in making them. I felt that, for some [31] reason, maybe, I don't know, she wouldn't get support of – she was, like, maybe, the only one that was going to say something about this, I don't know, something like that.

Q What did you know about Rebecca Flecksteiner before she made this complaint?

A Nothing. I don't know anything about the woman.

Q You didn't arrest her?

A I don't think so.

Q Do you know what she was serving time for in your jail?

A No.

Q Did you have any reason not to believe her?

A Well, that goes – yes and no.

Q What were the reasons? What do you mean by "yes and no"?

A Well, in her statement, she didn't actually name who the women were that were fondling Dominick. In one of the sentences that she wrote, she said that the Detention Officer came over the intercom and said flash your – "Show us your tits," or whatever, and, you know, she couldn't say exactly who the Detention Officer was, things like that. She [32] wasn't real specific in what she was saying. She was making allegations, but she wasn't saying, maybe, who the other females were that, maybe, did touch Dominick, or Dominick had them touch him, or things likes that. She couldn't tell me who it was that came over the intercom and said, "Show us your tits."

Q Show us your tits?

A You know, so she couldn't say that was Dominick that came over the intercom and said that. She couldn't say that was Robert that came over the intercom and said that. She couldn't say that was any of the other detention officers. She just said an officer.

Q Did you ask her about a specific officer?

A Yeah. She didn't know who it was. She just said it came over. And one thing that went in my mind was, then – you know when you've been some place, or you know

somebody for a long time, like an incident where you pick up the phone, the phone rings, you pick it up, you hear somebody's voice, and they don't have to tell you, "This is so and so," because you already know their voice. She had been in there for a while, I believe. Inmates get to know who's working the control room by the voices over the intercom.

[33] Q Do you think that the reason Ms. Flecksteiner did not tell you who the female inmates were that fondled Dominick Gonzales was because of fear of repercussions from those inmates?

A I don't know.

Q Did you ask her specific questions about which inmates fondled Dominick?

A I may have. I don't remember, specifically, if I did or didn't.

Q All right. So when I asked you the question about, you know, did you believe her or not believe her, you said, "Yes and no." So is the part you were having trouble with the part where she reported that a Detention Officer was asking women to flash their tits, and she couldn't tell you who?

A Well, both. She didn't tell me who the – you know, I didn't want to take and say that she was making this up. I wanted to give her the benefit of the doubt. Also, I needed to give the officer the benefit of the doubt when I talked to him. She couldn't be specific as to who came over the intercom. She was just saying things. She wasn't being specific as to who touched Dominick, who didn't touch Dominick, who came over the intercom, you know, stuff like that.

[34] Q Did you ask her why she couldn't give you these specifics?

A I don't know. I may have.

Q All right. Did you interview Josette Montez?

A Yes.

Q What did Ms. Montez tell you?

A Kind of the same thing. She said that she seen women flash their breasts. She mentioned something about inmates being called to the Med room and inmates going to the control room. She mentioned an incident where Dominick came in and was letting women touch him, unzipping his pants, touch him, stuff like that. Again, she wasn't detailed, either. She didn't, you know, she didn't say who it was, she didn't say anything. As far as inmates leaving, going to the Med room, that's where meds are given out, stuff like that.

Q What happens to snitches in the jail?

A What happens to snitches?

Q Yeah.

A I don't know.

Q No idea?

A I guess there could be repercussion from inmates, I don't know.

[35] Q All right. What happened when you confronted Dominick Gonzales about this report of inappropriately dropping his drawers in the female pod?

A He told me that that did not happen.

Q Is that consistent with your experience in investigating inappropriate sexual conduct, or sexual assaults, the denial?

A Could he have been denying? Yes.

Q What did you do to find out whether he was telling the truth or lying to you?

A I questioned him.

Q Did you check his body language?

A Yeah.

Q What was his body language?

A Fairly normal. He sat, talked to me, looked me in the eye. He wasn't nervous, he wasn't agitated. He spoke clearly, answered my questions, was calm.

Q Would that also be consistent with someone who has a lot of experience not telling the truth, that they're able to deliver this to you without the body language that you would be looking for?

A I guess. I don't know.

Q You don't know? Okay. So when you've [36] investigated cases in the past, have you had somebody flat out lie to you, and they did it in a way that you had no clue?

A That I didn't know they were lying?

Q Right.

A I don't remember. I may have, I don't know.

Q So you have two inmates who have reported the same thing, that Dominick Gonzales exposed himself to females in the jail. Who did you believe, the inmates or Dominick?

A Well, without any of the actual – I mean, females who may have touched him, they never came forward and said, "Yeah, Dominick came in here, and I fondled him." There's a camera in that pod, that looks into the female pod. No other Detention Officer came forward to say, "Yeah, I saw Dominick go in there, and he was doing this." This is based on what they said, and their statements were, yeah, they named – they made allegations of what he did, but they didn't say exactly who done it, so I could follow up and talk to those people.

Q Why wasn't it enough that they told you –

MR. BROUGHAM: Just a minute. He's answering the question.

[37] Q (By Ms. Bisset) I'm sorry.

A So without having a specific, if you call her a victim, or a participant in this, you know, female participant in this, without having that – or, like I said, there's a camera in there. I imagine if a Detention Officer saw something, you know, they knew this – everybody knew that I was doing this investigation. I figured somebody would come up and tell somebody, and eventually, the word would get to me that, yeah, I saw Dominick do this. But that never happened. And based on, like I say, what Dominick had to say when I questioned him, I came to the conclusion that I really couldn't say that these allegations happened or that they didn't happen. At that point in

time, I didn't have enough to say Dominick did do this or Dominick didn't do this.

Q Did you look for the video films of the pod?

A The pods aren't taped.

Q Okay. So there wouldn't be any way to find that out by looking at a videotape of the pod?

A No.

Q Did you ask any other inmates? Did you expand the scope of your investigation to ask other [38] female inmates what happened that day?

A I didn't.

Q What was the reason you didn't go any further?

A I don't know if – well, I don't know if Ms. Montoya did or not. I know I didn't. I had the two statements from those two, and, like I say, I couldn't say – I came to the conclusion I couldn't say if it did happen or it didn't happen.

Q Were there any other female inmates in the jail at that time?

A I think so. I don't know.

Q Why didn't you ask them any questions?

A I don't know if there were any other ones in there. I don't know.

Q Did you consider asking other inmates if they saw anything?

A Other inmates, as far as who?

Q Other female inmates who might have been in the pod at the time Dominick came in and pulled down his pants?

MR. BROUGHAM: Object to form.

A No, I don't think so.

Q (By Ms. Bisset) Did you interview any Detention Officers who were on duty at the time that [39] Dominick Gonzales was accused of exposing himself to the female inmates?

A I don't – the only other Detention Officers I spoke with were Alan Ruiz and Cory Berger.

Q Were they on duty at the time that this incident supposedly happened?

A I don't know. I would have to go back and get the schedules back then.

Q What did they tell you?

A When I talked to them, their information was about Dominick having male inmates in the control room.

Q So you didn't interview any other Detention Officers about whether this report of Dominick exposing himself to female inmates was true or not?

A I don't think I did.

Q Why not?

A Again, it came back to who actually done this? Who were the females who actually participated in this?

Q All right. Isn't it enough that you have a complaint about an officer exposing his genitals to female

inmates to take action, regardless of whether someone touched him or they didn't?

[40] MR. BROUGHAM: Object to the form of the question. Go ahead.

A I did take action. I brought in Dominick, and I questioned him on it.

Q (By Ms. Bisset) Why didn't you recommend or take disciplinary action on Mr. Gonzales in the face of these allegations?

A Because they were unsubstantiated. I couldn't prove, at that time, if they could – if the allegations did happen or the allegations didn't happen. And in my report, if you read my report, I left it open, that if further information came up in the future, that information would be investigated.

Q Did you look into it any further?

A After that, there was nothing else that arose, as far as that happening.

Q All right. You have two female inmates who corroborate that this happened. Why wasn't that enough?

A Sometimes inmates make up things, too. These are two inmates who had been in the pod together. I don't know. You know, I don't know if they were making it up, if it was true. Like I said, I couldn't substantiate whether Dominick did do these things or whether Dominick did not.

[41] Q Did you have any reason not to believe either Ms. Flecksteiner or Ms. Montez?

A Again, it depends on the circumstances.

Q So a Detention Officer could actually get away with inappropriate conduct in the jail, because he would know that when it comes to an officer's word against an inmate's word, you're going to accept the word of the officer, right?

MR. BROUGHAM: Objection, argumentative.

Q (By Ms. Bisset) That's what it looks like. Tell me why that's not true.

A Because if there is corroborating evidence to show that a Detention Officer did do something inappropriate, then action would be taken, either disciplinary or criminal charges.

Q Any evidence you might find might be physical evidence?

A Correct.

Q There was none here?

A Right.

Q You had two witnesses. That's a corroboration, isn't it?

A Two witnesses who have been together in the same pod. Did they make it up, you know, have [42] time to get their stories together and put down the same things? You know, that's one thing I look for when I'm investigating cases. I try and keep witnesses separate. The more time they have together, they come up with a version of what happened, and not exactly what they saw happen.

Q Did you consider what the motive might be of these two female inmates, why they would report this?

A Maybe, you know, if they were making it up, maybe they were doing it to get Dominick in trouble, because he may have not let them to go the library, or something like that.

Q Did you ask him any questions like that, to determine what the motive might be?

A You mean, as far as if they were mad at Dominick, or anything like that?

Q Well, another question might be, did you ask Dominick what motive they might have to make this complaint about him?

A I may have asked Dominick why they would make it up or why they would say that.

Q Let's think about the consequences here. Ms. Montez and Ms. Flecksteiner come forward with this accusation that Dominick Gonzales has exposed [43] himself to the females in the jail?

A Uh-huh.

Q How is that going to get them anywhere? How is that going to help them? If you find that there's not evidence to substantiate their complaint, now they're stuck with Gonzales doing whatever he wants to do, right?

MR. BROUGHAM: Object to the form of the question.

A Doing whatever he wants to do, how do you mean?

Q (By Ms. Bisset) He could retaliate against them for making a complaint like that.

A Retal[illegible] how?

Q By withdrawing privileges.

A Well, then that would be reported, and that would be looked into if he done that.

Q If an inmate makes a complaint that this Detention Officer has performed some kind of conduct, nothing happens, why would they complain again if he retaliates?

MR. BROUGHAM: Object to form.

A Why would they complain again?

Q (By Ms. Bisset) Yeah, why would they ever bring it up again? Obviously, you're taking [44] Gonzales' word over the female inmates'.

MR. BROUGHAM: Object to form.

A I'm saying there wasn't enough to prove he did do it, not enough to say that he did do it.

Q (By Ms. Bisset) Was it a red flag to you, about his performance problems? If it is true, this is a performance issue, isn't it?

A Could be a conduct issue, yes.

Q Yeah. This is right about the time you got this complaint about Gonzales in Pueblo?

A Uh-huh, yes.

Q Did you ask him if he had some personal problems motivating this conduct?

A No, I don't think I got into – I mean, problems at home, and stuff like that, I don't think I got in depth about, you know, "Are you having problems at home?" or anything like that.

Q You said that you also investigated something about inmates in the control room?

A Yes.

Q I'm going to hand you what was marked, previously, as Ruiz Deposition Exhibit 1. You've seen that before?

A Yes.

Q Is that your handwriting on the bottom?

[45] A Yes.

Q And you signed this on October 17, '97?

A Yes.

Q But Officer Ruiz said that this happened on August 10, '97?

A Yes, that's what he put.

Q Why was it you didn't look into this until October?

A He didn't bring it to my attention until October.

Q Where do these Incident Reports go?

A In a file, in the Incident Report file cabinet.

Q Who's responsible for reviewing what goes in there?

A As far as placing them in there? Myself and the Sheriff look over the reports, sign off on them, distribute them wherever they need to go. The originals go into the secretary's office. They make file cards from the Incident Reports, and then she'll place them into the folders.

Q So this wasn't brought to your attention in August, that this had occurred?

A No.

Q How is it that this came to your attention

* * *

[50] happen?

A This is training that comes down from senior staff. When a person is hired, they're taken through, shown processes of booking, things like that. The Sheriff has talked to them, I've talked to them about do's and don'ts, things like that.

Q All right. So are you saying, here, that because Ruiz told you he smelled alcohol, as opposed to an alcoholic beverage, on the breath of these inmates, that you didn't think they were drinking?

MR. BROUGHAM: Object to form.

A Well, what I'm saying is, one, there was no physical evidence, as far as empty containers, or anything like that.

Q (By Ms. Bisset) What about the red eyes?

MR. BROUGHAM: Let him finish his answer.

A Two, there would have had to have been another Detention Officer on shift with Dominick at the time. Why didn't any other Detention Officer come forward and say, "Dominick had these inmates in there, and they were drinking"? It took Alan two months, but he finally came forward when all this other information came up. And he came forward and said it. Why didn't any of the other Detention [51] Officers come forward and say it?

Q (By Ms. Bisset) Are there repercussions for ratting on a fellow officer working in a small detention facility?

A No. The Sheriff wouldn't have that.

Q Wouldn't it take some guts for Alan Ruiz to come forward and say, "Yep, I was the new guy, I saw this happen, I didn't know what to do. Now I'm telling you, this is what happened"?

It would take some guts for him to come forward, wouldn't it?

A I guess if you want to call it that.

Q Do you have any reason to think that Alan Ruiz would make this up?

A I'm not saying he's making it up. Again, I'm saying there's nothing – I can corroborate and say, yeah, Dominick – I had Dominick's own admission saying he had inmates in the control room. As far as the alcohol goes, there's nothing there to show that they were actually drinking in there.

Q Why isn't it enough that Dominick had inmates in the control room? Why isn't that enough, alone, to fire Gonzales?

MR. BROUGHAM: Asked and answered, argumentative, an issue that has nothing to do with [52] the claims in this lawsuit. This is not a negligent retention lawsuit. This is a case controlled entirely by the Circuit Court's decision on actual knowledge of sexual improprieties. Asked and answered for the second time.'

MS. BISSET: Are you going to instruct him not to answer?

MR. BROUGHAM: No. I think you are kicking this dead horse that's been dead for half an hour.

MS. BISSET: I know you think that.

MR. BROUGHAM: You clearly are. He's answered that question.

Q (By Ms. Bisset) Let me ask it a different way. Did you consider firing Gonzales based on this complaint, or this report of his conduct?

A No.

Q Why not?

A I gave him a reprimand going in his file. At the same time, I said, "These are two incidents." This and the Pueblo incident were incidents that came to light within a couple days of each other. I gave him a reprimand on the inmates in the control room. I disciplined him by suspending him for the Pueblo incident, immediately. He was not allowed to come to [53] work that afternoon. I recommended he be demoted from his rank of sergeant to deputy, that he be put on six months' probation, not to violate any further department policies, any laws, anything like that, and the unpaid time.

I figured, as I would with any employee, unless it was something major, you know, a felony, something like that, that an officer who's basically been a good officer up until the Pueblo incident, and until I learned of him having inmates in the control room, basically, a good officer, I felt he deserved a second chance.

Q Which is more concerning, taking a patrol car to visit someone to drop off presents, or having inmates in the control room?

MR. BROUGHAM: Object to form and inadequate foundation to state all the evidence on that issue.

A Again, I wasn't involved directly with the incident that involved the Detention Officer taking the vehicle. That was the Sheriff's, not mine. I was involved in this one. If you're asking me which I think is more serious, probably the inmates in the control room. But in the same light, he being involved, the Detention Officer taking the vehicle to

* * *

[62] Q (By Ms. Bisset) You were undersheriff in 1998, weren't you?

A Uh-huh. Well, First Sergeant, acting Undersheriff, yes.

Q Okay. Did you have access to the investigation about Amanda Guel's complaint?

A If I would have requested it, I probably would have had access to it.

Q You chose not to request it?

A I did not become involved in this particular situation, because I was involved in a drug case at the same time that this incident came up. So I was involved in the drug case, and preparing search warrants and putting together a raid plan at the time this came up. So I never got involved in Ms. Guel's case, as far as anything in the jail. I never was involved in that one or Tereza Gonzales'.

Q Did you ever meet Amanda Guel?

A I can't say I have, no.

Q Did you arrest her for any reason?

A Not to my knowledge, I never arrested her.

Q Do you know what she looks like?

A Not to my knowledge, no.

Q Ms. Guel states that you arrested her in [63] the courthouse. Do you remember that?

A I did?

Q Yeah.

A No. I don't remember it.

Q Do you remember arresting a woman who was about five-seven, with blond brown hair in the courthouse at any time?

A I may have, I don't know. We get called over for people who show up with warrants over there. The Court calls and says, there's so and so here with a warrant. Would you come and arrest him or her.

MS. BISSET: Okay. Let's go off the record.

(Whereupon, a discussion was held off the record.)

(Whereupon, the last answer was read back by the reporter.)

A Yeah. You know, there are males and females that show up, they show up with outstanding warrants for them. The Court calls us, we go over there to pick them up, or the judge sentences someone, they call, and we go over and pick them up, book them into jail on a writ that comes from the Court, or a warrant that comes from the Court. I may have arrested her. I don't remember her [64] specifically.

Q (By Ms. Bisset) Okay. All right. Back in October of 1997, when you were investigating these three things involving Gonzales, the incident in Pueblo, the complaint of the female inmates that he had exposed himself and this Incident Report by Ruiz, is one of the reasons you didn't fire Gonzales because he was related to the Sheriff?

A No.

Q Was that a consideration at all?

A Not as far as I was concerned.

Q Did you have any discussions with the Sheriff about your findings?

A I relayed to him what I did and didn't find out, yes.

Q Did the Sheriff say, "I want you to make certain decisions about this because he's my son-in-law"?

A No.

Q Did he delegate full responsibility to you for dealing with these complaints about Gonzales?

A I'm in the position where I investigate the allegations of Deputy or Detention Officer misconduct, as well as criminal investigations. So I guess you could say he – I wouldn't say delegated me [65] specifically to this, but part of my duties are to do this.

Q Did the Sheriff make any decisions on his own about what to do with Gonzales?

A He may have.

Q When you had this what you consider to be undeterminable complaint by the inmates about Gonzales exposing himself, was there probation attached to that conduct, or counseling?

A All these things fell in place, like I said earlier, right around the same time, the inmates in the control room, the allegation of exposure and the incident in Pueblo. I could not substantiate the allegations of exposure. It was unsubstantiated, and I left that part open, if further information came up, to be investigated.

The disciplinary action I took was the written warning in the file for the inmates in the control room, which went along – I mean, all this fell in the, you know, one big thing, okay? You get – a written warning is filed, this thing in Pueblo comes up, so I have him demoted from the rank of Sergeant to Deputy, unpaid "X" amount of time and six months' probation. It was all kind of – even though they're kind of separate incidents, everything fell

* * *

[70] Q Is it your impression that Sheriff Salazar would believe a Detention Officer over an inmate any day?

MR. BROUGHAM: Object to the form of the question. Lack of foundation, also.

A I think Sheriff Salazar would base his decision on whether he believes somebody or not believes somebody, based on the facts that he had at hand.

Q (By Ms. Bisset) At the time – let me ask it in a different way. The things that Dominick Gonzales did in Pueblo, were those offenses which could cause someone to serve time?

A I believe so.

Q Do you know if Dominick Gonzales served any time behind his offenses in Pueblo?

A No, I don't.

Q Do you know if he served time behind his offense against Ms. Guel?

A If he served time?

Q Right.

A I think he did.

Q Have you had any discussions with Dominick Gonzales since he left the Sheriff's Department?

A No.

[71] Q Do you know what he's doing now?

A No.

Q Did you have any complaints about Robert Martinez prior to the time that he was excused of sexually assaulting Tereza Gonzales?

A No.

Q Did you have any complaints involving Samuel Lopez, any complaints that Samuel Lopez made about Dominick Gonzales?

A There was an incident involved in the jail; although, I think I was on vacation at the time, and I didn't investigate it.

Q Did you review it?

A I don't remember if I read the report or not.

Q Well, let me ask you about it, though. Apparently, there were words between Samuel Lopez and Dominick Gonzales, where Lopez was asking for some forms, and he used four letter words?

A Uh-huh.

Q Is that your recall of part of what happened?

A No. I'm just going along with you.

Q All right. And after these four letter words were exchanged, Dominick went into the cell and [72] started roughing up Samuel Lopez. Is that acceptable behavior on the part of a Detention Officer?

MR. BROUGHAM: Object to form, lack of facts and evidence before this witness.

A No, a Detention Officer shouldn't have any type of physical contact with any inmate unless an inmate is

doing something in an aggressive form, where he may injure, or he's intending to injure a Detention Officer or another fellow inmate.

Q (By Ms. Bisset) Okay. If an officer like Dominick Gonzales uses force just over a verbal dispute, is that grounds for discipline?

A It might be.

Q The force that's described by one of the witnesses is, "they wrestled, with Dominick pushing Sam across the day room, slamming in my door and locking me inside."

Another witness described it as, "Mr. Gonzales came rushing into a pod and physically attacked Sam. As Mr. Gonzales grabbed and wrestled with Sam, they first hit the front window section of the pod, then into the shower partition, with Sam finally being thrown to the floor. While Sam was on the floor, Mr. Gonzales threw a punch to Sam's head."

What do you think about that kind of [73] conduct?

MR. BROUGHAM: Object to form, lack of any foundation as to this witness' personal participation or personal involvement in the incident and the assumption of the facts as being true. What does he think about it? Go ahead and tell her.

A If what is being said there is true, then that's misconduct on the part of the Detention Officer.

Q (By Ms. Bisset) So if you have a Detention Officer who's using too much force in – and I'm going to tell you that this was reported in April of '98. No, let's see. Yeah, April, '98. If you have an officer who is reported as using

this level of force in the detention facility, would that be grounds for discipline?

A Some type of disciplinary action, if the allegations were true.

Q Is it your testimony that you didn't review this Samuel Lopez incident at all?

A I don't remember if I read the report or not. I know I didn't do the investigation on it.

Q Who did?

A Robert Pacheco.

Q What's Robert Pacheco's job with the

* * *

[82] to investigate accusations against members of that Sheriff's Office?

MS. BISSET: Object to form.

A In a criminal sense?

Q (By Mr. Brougham) Yes.

A It's better if an outside agency does the criminal investigation.

Q And the CBI was the outside agency?

A Yes. That, and I don't know if the District Attorney's Office investigators played a part in it or not. I don't know. CBI, I would say, would be the lead agency.

Q Who was the CBI agent that did that, do you know?

A I think it was Dave Sadar.

Q S-a-d-a-r?

A Yeah.

Q In 1997, as then acting Undersheriff, or effectively the Undersheriff, did you have authority to effectively discipline Dominick Gonzales?

A Yes, I did.

Q I believe in review of the dates of the investigation of the female pod accusations against Mr. Dominick Gonzales, the Pueblo incident and the control room incident are almost the same date or the [83] same week; is that correct?

A Yes.

Q And I believe you stated that you suspended Mr. Gonzales immediately after you received the Pueblo faxed reports from the Pueblo Police Department?

A That's correct. It was this afternoon that he was to begin shift, his work at 4:00 o'clock. And I met with him, roughly, around, I don't know, 3:30, something like that. It was prior to his shift when he came in, and informed him of the allegations and suspended him.

Q At that time, had you completed your inquiry into the female pod incident that we've discussed at length today?

A I don't remember if I completed that at that time or not.

Q At that time, had you completed your inquiry into the control room incident that we've discussed today?

A I don't remember if I completed that one or not. Like I say, it was right there in the same time frame, and they're both ongoing so I don't know that I completed it at the same – if that was complete prior to me suspending him or not.

[84] Q All three of these incidents effectively involved accusations of Dominick Gonzales within a few days of each other?

A Yes.

Q Effectively, as a result of these accusations, Mr. Gonzales, Dominick Gonzales, was suspended, placed on probation, demoted and received a letter of reprimand and a warning in his personal file?

A Yes.

Q Between that action in October of 1998 – excuse me, strike that. Between that action, that disciplinary action by you in October of 1997, and October of 1998, you were apparently, unaware of any further accusation of any type of improper conduct on the part of Dominick Gonzales; is that correct?

A I believe so.

Q Now, when you were looking into the accusations of Inmates Flecksteiner and Montez during October of 1997, essentially Ms. Montez says is reflected in her written statement, is it not?

A Yes.

Q Did Ms. Montez identify any female inmate who touched Dominick Gonzales?

[85] A No.

Q And I take it that Ms. Flecksteiner did not identify any specific female inmate?

A That's correct.

Q When you looked into these accusations and before you concluded that, effectively, they were unsubstantiated, or you couldn't prove them, you were aware, I take it, of what the elements were of felony sexual assault, under Colorado law?

A Yes.

Q Did what Ms. Flecksteiner said about Dominick's activities amount to felony sexual assault on any person?

A No.

Q Did you have the name of any alleged victim at that time?

A No.

Q Did what Ms. Montez said amount to felony sexual assault on any person?

A No.

Q Similarly, you had no alleged victim from the Montez statement?

A No.

Q Now, when you talked with – you then went and presented Dominick Gonzales with these [86] accusations; is that correct?

A Yes.

Q And he first stated that any accusation that he asked female inmates for sexual favors was not true; is that correct?

A Yes.

Q But he did state that on one occasion, when he was in the female pod, an inmate named Renee came up from behind him and tried to undo his belt; is that correct?

A Yes, Dominick stated that.

Q He also admitted that one time when he was in the female pod, a female inmate named Kathy came up in front of him and tried to undo the belt to his pants; is that correct?

A That's what Dominick said.

Q He did not deny that there may have been incidents in which female inmates were touching his body, but explained them in a different way than Ms. Flecksteiner and Ms. Montez had?

A That's correct.

Q Dominick apparently also told you of an incident in which one female had offered to give him oral sex. I take it that was a female in the female pod?

[87] A Yes, he mentioned that incident.

Q And these factors, or this information, or these admissions, such as they were from Dominick, you had to place in your grist mill and grind them up and see what you came out with?

A Correct.

Q As a result, you found, in your own opinion, no sufficient evidence to either take the case to the District Attorney's Office or to take any action against Dominick Gonzales, other than that which had already been taken?

A Correct.

MS. BISSET: Object to form. Object to leading.

MR. BROUGHAM: I have no further questions.

MS. BISSET: I have a couple.

FURTHER EXAMINATION

BY MS. BISSET:

Q Why did you bother calling Dee Pacheco?

A Why did I bother when?

Q When you called her about this statement that you just reviewed.

MR. BROUGHAM: Object to form.

A I didn't call her. She was at the office.

[88] Q (By Ms. Bisset) Why did you bother talking to her about it?

A She was there, and I asked her about it. I had seen the letter, so I asked her about it.

Q Did you ask Sheriff Salazar if he had seen the letter before?

A Yeah. He's the one who gave me the copy that was faxed from Mr. Brougham.

Q Did he make any statements to you about the letter?

A He said he never seen it.

Q Do you have a separate file for internal investigations on personnel?

A If there's an internal investigation, the findings and that go in the personnel file.

Q Do you have an internal investigations file on Dominick Gonzales that we haven't seen?

A No. Everything that you have is what was in his personnel file.

Q But you said you had a separate internal investigations file.

A No, that's not what I said. I said anything that's investigated, if there's an internal investigation, whatever findings go in their personnel file. That's one file.

[89] Q I thought you said the opposite, if they don't go in there, they go somewhere else. Did you think it was okay to allow Dominick Gonzales to allow female inmates to have sexual contact with him?

A No. And the way he was explaining it, he was trying to get out of there, away from them when they were doing that, if I remember right.

Q In this statement from Dana Montoya, she states Rebecca Flecksteiner reported to her that female inmate Barbara Renee Garcia agreed verbally, and by gesturing "yes" with a nod of her head, that she apparently had sexual contact with Gonzales.

A What's the question?

Q You said you couldn't find a victim. Did you ever interview Barbara Renee Garcia?

A No, I don't think she was in jail at that time. I don't remember ever talking to her.

Q Well, why didn't you call her if she wasn't in the jail?

A I don't know. I don't know who Renee Garcia is, Barbara Renee Garcia. I don't know her.

Q How hard would it be to find out? Don't you have booking logs?

A Yes.

Q You could have gone out to her house and

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UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 99-S-1967

THE DEPOSITION OF CHARLES L. MONTOYA, 11-29-00

AMANDA GUEL,

Plaintiff,

vs.

HUERFANO COUNTY BOARD OF COUNTY COMMISSIONERS, HUERFANO COUNTY SHERIFF JOHN SALAZAR, DOMINICK GONZALES AND ROBERT MARTINEZ,

Defendants.

PURSUANT TO NOTICE, the deposition of CHARLES L. MONTOYA was taken, on behalf of the Plaintiff, pursuant to the Federal Rules of Civil Procedure, at the Sheraton Hotel, 2886 South Circle, Colorado Springs, Colorado, commencing at 9:25 a.m. on November 29, 2000, reported by Carol Specht-Komma, Certified Shorthand Reporter and Notary Public for the State of Colorado.

APPEARANCES:

For Amanda Guel:

JENNIFER E. BISSET, ESQ.
THE LAW FIRM OF
JENNIFER BISSET
1120 Lincoln Street
Suite 1001
Denver, CO 80203

DAVID S. HOOVER, ESQ.
THE HOOVER LAW FIRM
2145 Kipling Street
Lakewood, CO 80215

For John Salazar, Huerfano County, and Huerfano Board of County Commissioners:	DAVID R. BROUGHAM, ESQ. HALL & EVANS, L.L.C. 1200 – 17th Street Suite 1700 Denver, CO 80202

* * *

[6] A Yes, it is.

Q What is your title?

A Huerfano County Commissioner, District 1.

Q How long have you been serving as a County Commissioner?

A Four years.

Q Four years?

A Yes, ma'am.

Q When were you first elected?

A Four years ago, same time.

Q So what year would that be, 1996?

A '96, yeah. I took office in '96.

Q And do you live in Walsenburg?

A Yes, I do.

Q What's District 1?

A The County is divided into three districts. There's three County Commissioners, and each one of the County Commissioners represents one district.

Q Which district is yours?

A One.

Q What area does that encompass?

A Part of Walsenburg and Gardner.

Q How long have you been living in Walsenburg?

[7] A Oh, probably all my life.

Q Have you ever been an inmate at the jail?

A No, I haven't.

Q Do you have any relatives who have been inmates at the jail?

A Yes.

Q When you were running for Board of County Commissioners, what was your platform? What did you think you could do to help the County?

A Well, there's a couple – there's several issues, but improve roads – let's see, that's kind of an unexpected question, but –

Q I figure you know what your campaign was about, so that's why I'm asking.

MR. BROUGHAM: If you recall.

A Serve the interests of the taxpayers in Huerfano County and the citizens of Huerfano County.

Q (By Ms. Bisset) Why would any tax payer elect you on that basis? What did you think you could do?

MR. BROUGHAM: Object to the form of the question. It's argumentative. Go ahead.

Q (By Ms. Bisset) You'll probably hear a number of objections to questions I'll ask you today. There might be relevance, form of the question. [8] Mr. Brougham is marking the record with what he thinks are objections to the questions I'm asking. You are to answer the question unless Mr. Brougham instructs you not to.

MR. BROUGHAM: He understands that. We've talked about that. The question was, why would any citizen vote for you on that platform? Can you answer that question?

Q (By Ms. Bisset) It's too general.

MR. BROUGHAM: What, the question or the platform? Objection.

Q (By Ms. Bisset) The platform.

A That is not the only platform that I campaigned on, okay?

Q Okay.

A We have growth problems, okay? That was a big concern in Huerfano County, citizens of Huerfano County, especially development. And I based my platform on that, controlled development, improving the roads, county roads. We have 700 miles of county roads that we service. Also, to improve morale of the county employees.

Q And was that county wide employees, or was it employees in specific departments?

A County wide employees.

[9] Q What about the morale of county employees in the Sheriff's Department?

A We don't get too much involved in that particular area, because John – the only thing we do in that department is control the budget. So John does the hiring and firing. We don't – we don't improve – you know, we don't tell him who to hire or who to fire.

Q So if you're trying to improve morale of county employees, did that include employees of the Sheriff?

A Oh, yes. We try to do – to improve the morales there, and all. We try to give benefits, salaries, competitive salaries. And that right there goes into the budget.

Q Before you were elected as a County Commissioner, did you have any knowledge about the reputation of the jail in Huerfano County?

MR. BROUGHAM: Object to form. Do you understand the question?

THE WITNESS: Yes.

A Do you want me to answer that?

Q (By Ms. Bisset) I do.

A I wasn't aware of any – any problem at the Sheriff's Department.

[10] Q Were you aware that Huerfano County had been sued, in the early 1990's, for sexual harassment of an inmate at the Huerfano County Jail?

A No, I wasn't.

Q No one has talked to you about that?

A No.

Q Do you know who the Sheriff was in the early 1990's?

A Could have been Harold Martinez.

Q And what was his reputation in the community, in terms of how he operated the jail?

A As far as I know, Harold did a good job. I think he was there, like, 16 years.

Q Who would have knowledge about this previous lawsuit against Huerfano County for sexual harassment of a female inmate in the jail?

A Prior to me being County Commissioner?

Q Yes.

A Probably the former commissioners.

Q Who would that be?

A Neal Cocoa, Bill Reiner, Xavier Sandoval.

Q You said Bill Rider?

A Reiner.

MR. BROUGHAM: Spell that for the court reporter.

THE WITNESS: R-e-i-n-e-r.

Q (By Ms. Bisset) What did you do before you became elected as a County Commissioner?

A I've been self-employed for approximately 30 years.

Q What's your occupation?

A Auto repair shop, towing service.

Q Are you still doing that on a full-time basis?

A No, I'm probably half – half my time is devoted to Huerfano County and the other to my business.

Q Are you paid by the County for your services as a commissioner?

A Yes, I am.

Q And what is the pay?

A I think 23,000, something like that, 24,000.

Q A year?

A Yes.

Q All right. I asked you, earlier, if you had had any family members or relatives who spent time in the Huerfano County jail.

(Whereupon, a discussion was held off the record.)

[12] A Yes. I've had relatives.

Q (By Ms. Bisset) Okay. Which relatives have spent time in the jail?

A Probably cousins, probably not closely related.

Q Can you give me their names?

A Raymond Montoya.

Q Anyone else?

A Not that I can think of right now.

Q Did you have an opportunity to discuss Mr. Montoya's stay at the jail?

A No.

Q He didn't talk to you about it?

A No.

Q Didn't tell you there were any problems in the jail?

A No, huh-uh.

Q Did he serve time in the jail before or after you were elected as County Commissioner?

A Probably before and after.

Q Do you know the reasons why Raymond Montoya was spending time in the Huerfano County jail?

A No, I don't ma'am.

Q Have you had a chance to talk with any [13] other citizens in Huerfano County concerning conditions in the jail since you became an elected County Commissioner?

A No, huh-uh.

Q No one has come to you complaining about it?

A No.

Q Did you have a citizen, who had been an inmate at the jail, complain at the Board of County Commissioner meeting about the conditions in the jail?

A Yes.

Q Who was that?

A Stella Duran.

Q Do you know when that occurred?

A I tell you what, there probably has been other people, but I don't know their names, I think two other people.

Q Were they male or female?

A One was a female. I think, if I'm not mistaken, she's been there either once or twice.

Q Will you tell me about the complaints that were made known to you by each of these three individuals you just told me about.

A I think the last one we heard was a lady [14] that was complaining about the heat in there, that the temperature wasn't controlled properly.

Q Okay. So it was too hot?

A Yeah.

Q When did she make this complaint?

A Probably about four or five months ago.

Q Okay. What did the male inmate complain about?

A I don't know. I can't remember – I don't believe that there was a male inmate that came to see us. The lady that came to see us was relation of somebody in jail.

Q Oh, I see. And who was that?

A I don't know the name. It was a Martinez, if I'm not mistaken.

Q What was the complaint?

A That the temperature wasn't controlled properly.

Q All right. Tell me about what Stella Duran complained about.

A Stella Duran come into our office and told us that there was – first she was upset about not being able to get some prescription drugs that she had to have. And she did say that there was some sexual activity going on. She did say that there was [15] drug related activities going on, also.

Q Do you recall when it was that Ms. Duran visited the County Commissioners about these topics?

A Who? Ms. Duran? No, I don't remember.

Q Do you know if it was shortly after you were elected?

A Probably. It was shortly after, yes, probably a year, maybe.

Q '96 or '97?

A Yeah.

Q Do you think it was as late as 1998?

A No, huh-uh, I don't believe it was.

Q What did you – what specific complaint did she make about sexual activity in the jail?

A I can't remember what the detail was.

Q Was she complaining about the Detention Officers?

A Ma'am, details, I can't remember, even if she told us about the people in there. All I know is that she did say that there was some sexual activities going on, and drug related, and she wasn't getting her prescription drugs.

Q All right. So was the drug related activities limited to her prescription drugs or something else?

[16] A Her prescription drugs.

Q So drug related activities, she wasn't reporting that people were bringing contraband into jail?

A I don't know if she went into detail with that. I cannot remember. I know she did mention drugs.

Q When she came to see you, was this a Board of County Commissioners board meeting?

A No. We were scheduled to meet at 10:00 o'clock in the morning, and I think this was before 10:00 o'clock that she did come in there. If she did come in, at least she was not on the agenda.

Q So was it a board meeting – let me ask you a different question. What kind of meetings do the Board of County Commissioners have as regularly scheduled meetings?

A What kind of meetings?

Q Right. What do you call them?

A Regular County Commissioner meeting.

Q Okay. Do you have executive meetings?

A Yes, we do.

Q What's the difference between a regular board meeting and an executive meeting?

A Executive, we talk about personnel [17] matters, negotiation of contracts, basically, that's – we make no decisions in executive session.

Q All decisions are made at the board meetings?

A Yes, ma'am.

Q You discuss the issues in executive session?

A Yes.

Q Do you take minutes at the executive sessions?

A No.

Q Do you take minutes at the Board of County Commissioner meetings?

A Yes, we do.

MR. BROUGHAM: Make sure you wait until she finishes the question so she can get your answer.

Q (By Ms. Bisset) Do you know if Ms. Duran came in during an executive session?

A No, she did not.

Q She just showed up early before a board meeting at 10:00 o'clock?

A I don't know what time she showed up, okay? But it had to be after 9:00 o'clock in the morning.

[18] Q Who was present when she showed up and made these complaints?

A I was present. I believe the other two commissioners were present, also.

Q Who were they?

A Oress DeHerrera – it could have been Xavier Sandoval, I'm sorry, and Donald Andreatta. Oress DeHerrera was not a commissioner.

Q Are you sure it was Xavier Sandoval?

A Yes.

Q You think he was there?

A Yes.

Q You think that Donald Andreatta was present?

A Yes.

Q How did you respond to this complaint of Ms. Duran about sexual activities in the jail?

A As far as I can remember, we did tell her that we would visit with Sheriff Salazar on the matter.

Q You would visit with Sheriff Salazar and what?

A On that particular matter.

Q All right. Did you do that?

A Yes, we did.

[19] Q What meeting did you have with Sheriff Salazar about Duran's complaints?

A We went down to his office, to the jail.

Q All three of you?

A Yes. Yes, yes, the three of us did, that I can recall, and we visited with John down there.

Q Do you recall what you discussed with him?

A We just told him that Stella had been to our office and talked about them three issues.

Q And how did Sheriff Salazar respond to the commissioners when this was reported to him?

A He thought maybe it was a personal vendetta, or to that effect. Because Stella was kind of – I don't know how you would describe her, but I think kind of an arrogant little girl. And she did occasionally cause problems, or whatever.

Q Do you recall any specifics about what she complained about, in terms of sexual activities?

A No, I don't.

Q Did she complain – do you remember if she complained about the Detention Officers doing inappropriate things?

A I don't – I don't remember her mentioning any names of people, personnel.

Q Okay. Do you know if she said that the [20] sexual activities were primarily going on between inmates?

A All she did say was there was sexual activities taking place.

Q That's all you remember about what she said?

A Yes, yes.

Q When Mr. Duran came forward with her complaints, did you ask her for more details?

A No, I didn't.

Q Did any of the other County Commissioners?

A Not that I can recall.

Q Did the other County Commissioners ask her for more details when she come forward with this complaint?

A Not that I can remember, ma'am.

Q Why not? Why didn't you ask her more questions?

A Well, because knowing Stella's reputation, I didn't feel comfortable, and I probably didn't really take that as a serious matter, because I – I've know her to tell stories.

Q How long have you known Stella?

A Probably 15 years.

Q Has she been living in Walsenburg for 15 [21] years?

A In and out of Walsenburg, yes.

Q What kind of activities is she engaged in in Walsenburg?

A Well, her brother is marred to my daughter. That's how the relationship is, and that's how I know her. But as far as activities, we don't share any activities or –

Q Maybe I asked you too general a question. What I would like to know is why you don't believe Stella. What kinds of experiences have you had with her that discredit her report to you?

A Well, I don't know, she's just probably – years ago, I know she was a troublemaker. Anything that she disliked or she had a vendetta against a person, she would try to do anything to hurt them.

Q Okay. Does she have a reputation in your family for being truthful or untruthful?

A My immediate family, like me and my wife? Are you talking about that?

Q She's a relative, right?

A Yes, but I don't consider her a very close relation. I try to – we stay away from her as much as possible, okay?

Q Why is that?

[22] A Because we don't get involved with people like that.

Q Her brother is married to your daughter?

A Yes.

Q What's his name?

A Miguel Duran.

Q What's your daughter's name?

A Della Duran.

Q Did Miguel Duran used to work for the jail?

A Yes, he was the Sheriff's deputy at one time.

Q Was he let go?

A Under – I'm sorry.

Q Go ahead. Under?

A Under Harold Martinez's time.

Q Seems to me, I recall, from Sheriff Salazar's deposition, that he let Miguel go from employment at the County; is that right?

A My son-in-law was involved in an accident with the Sheriff's vehicle in a storm. He was under disability. He broke his back. He was under Workmen's Compensation. And he was a great supporter of the former Sheriff, Harold Martinez, and that was one – probably the reason why that John let him go.

[23] Q Because he supported Harold?

A Yes.

Q And was it also because he had a work related injury?

A Probably not. I don't think that was the – my son-in-law had not yet got released from Workmen's Comp. He was still under Workmen's Comp. He did terminate him while he was under Workmen's Compensation. He didn't work for John at all.

Q Okay. When you took this complaint that Ms. Duran brought to you and the other two County Commissioners to Sheriff Salazar, did he tell you he was going to do anything?

A He said he would look into the matter.

Q Do you know if he did?

A I feel comfortable that he did.

Q Did he report back to you about it?

A Not that I can remember.

Q If Sheriff Salazar didn't report back to you about his investigation concerning Ms. Duran's complaints, how do you know he did anything?

A Well, I don't know. I just took it that he gave us his word that he would look into it, and I think that – I trust him well enough to say that he would do his job.

[24] Q But he never reported back to you?

A No, not that I can recall.

Q So how do you know he did anything?

A I don't.

Q Did you do any more follow-up, other than talking with Sheriff Salazar one time?

A No. I thought we had done what we were supposed to.

Q If you have complaints from inmates about the conditions in the jail as being substandard, how do you, as Board of County Commissioners, handle those types of complaints?

A John Salazar is elected, okay? We have no control of how he runs his department. The one, the complaints about the heat, we did go check on it, you know, to see if it was operating properly. And I think it was just a matter of controlling the thermostat, you know.

Q All right.

A But we do – if there is something that comes up, we generally bring it to his attention.

Q Then you expect him to deal with it?

A Yes.

Q Then is there any kind of reporting back to you so that you're satisfied that –

[25] A Not generally, no.

Q Well, let's think about this for a minute. You've got a Sheriff's employee at the jail. You're an elected official, and you're responsible to the citizens. If you have inmate complaints coming to you about the operation of the jail, and nothing gets done by the Sheriff, doesn't that affect your ability to get re-elected if that kind of problem gets out, and the County is not doing anything?

MR. BROUGHAM: Object to form.

Q (By Ms. Bisset) You can answer the question, sir.

MR. BROUGHAM: Go ahead. You can answer.

A We have – if somebody comes to me and tells me that there's a problem over there, I explain to them that – and any other elected official, whether any other department, County Clerks, Assessors, the Sheriffs, we can't control – I discuss this with whomever comes to me, that we cannot control their activities, and that we cannot tell them – we can suggest to them what to do, and what not, but that doesn't mean that they are to abide by what we ask them.

Q (By Ms. Bisset) If you have [26] unconstitutional conditions existing, in the jail, would you allow that to

continue? I'm going to give you an example. Maybe you've been reading about this in the paper, down at Super Max in Florence, that they say correctional officers were beating up on the inmates. There's so many inmates' complaints filed in federal court that they sent down a grand jury to investigate, and they found that these correctional officers were stepping outside the boundaries of their jobs and were beating these poor people up.

If something like that came to your attention in Huerfano County, what do you think the Board of County in Commissioners' responsibility would be to address that situation?

MR. BROUGHAM: Object to the form of the question. It makes the question a fact of law that there is a responsibility. To the extent you can answer that type of question, Commissioner Montoya, go ahead.

A I would probably go to the District Attorney and have the District Attorney do an investigation.

Q (By Ms. Bisset) So you would feel, though, as a Board of County Commissioners, that you couldn't, then, investigate the conditions of the [27] jail yourself, you and the other commissioners?

A We could do an inspection, as we generally do, monthly, and we could suggest to John what he has to do. We don't spend any time there to observe the inmates or the correctional officers, or whatever. We look at it, see that it's functioning, the doors are functioning properly, the generator is functioning, the backup generator, just the walls aren't, you know, all painted up or written on, and stuff like that. But other than that, I don't know that

anybody could tell the Sheriff what to do as County Commissioners. All we do is control his budget.

Q When you got this complaint from Stella Duran, did you report it to the District Attorney?

A No, I didn't.

Q So would it be fair to say that the Board of County Commissioners has a hands-off approach to the jail?

MR. BROUGHAM: Object to form.

Q (By Ms. Bisset) I mean, hands-off, hands off the Sheriff? You're not going to tell the Sheriff what to do?

A We can suggest to the Sheriff what to do, but he doesn't have to do what we ask of him.

[28] Q Do you have a hands-off approach to dealing with employees of the Sheriff's Department?

A If we have a problem with the employees, that I'm aware of, I'll visit with John about it. And it's up to John to correct whatever the problem may be. I haven't had that occasion.

Q Have you had any other complaints from people who have had a stay at the Huerfano County Jail about sexual activity in the jail?

A No.

Q So the only person who came forward was Stella Duran?

A Yes.

Q Did you get any complaints from Stella Duran's mother?

A No.

Q When you discussed this complaint from Stella Duran with the other Board of County Commissioners, did they discount what she told you?

A I don't know.

Q Do you know –

A I don't know how they felt about it. I can't remember what their comments was on it.

Q Does Xavier Sandoval have any knowledge about Stella Duran, that he shared with you?

[29] A No.

Q Did the other commissioner, Donald Andreatta, have any knowledge that he shared about Stella Duran with you?

A I don't know if he had any information.

Q Did the three of you discuss this complaint, what you should do?

A Yes, we went over and visited with John Salazar.

Q How long after she made the complaint did you visit with Sheriff Salazar?

A I think it was the same day.

Q Did you submit the complaint in writing?

A No, we verbally went over and visited with him.

Q Did you document the complaint that Ms. Duran gave you?

A No, we didn't, not that I'm aware of.

Q Do you think that you could have hired an independent investigator to go over to the Sheriff's Department to determine if there were improprieties in the Sheriff's Department?

A I think that would be under the District Attorney's jurisdiction.

Q At any time, have you asked the District

* * *

[38] MR. BROUGHAM: Object to form for relevance. That has absolutely no relevance to this lawsuit what a prior Sheriff's reputation was.

Q (By Ms. Bisset) You may answer the question, sir.

A I have no idea what Harold's platform was, or why he didn't get elected. Just as far as his reputation, I've never known it to be bad.

Q Have you heard any rumors, generally, in the community, about the jail's being – as there being sexually inappropriate activities going on in the jail prior to the termination of Dominick Gonzales?

A No.

Q What's the reason you don't remember the complaints of the Detention Officer or the deputy who came forward?

A Because, you know, it's been a long time, and I just can't remember why she had even been in there. It was some complaint, but –

Q Was it in executive session?

A No, it wasn't.

Q Was it a regular Board of County Commissioners meeting?

A Yes, probably before a regular meeting. [39] We sit down from about 9:00 to 10:00 o'clock, and people come in and out of there about that time, just because it's kind of like a free hour that we have.

Q So her complaint, was it in the Board of County Commissioners minutes?

A I don't know whether it is or not.

Q What steps did you take to investigate her complaint?

A I think that was the one time that I called the District Attorney's Office.

Q And what did you tell the District Attorney's Office?

A That there was, probably, problems in the jail that I wanted him to investigate.

Q And do you know who you talked to at the DA's Office?

A No, I didn't.

Q What problems did you want the DA to investigate?

A I wanted him to do an investigation and talk to this girl.

Q Did the District Attorney get back to you about the findings?

A No.

Q Did anyone in the District Attorney's [40] Office, to your knowledge, investigate this complaint?

A Not that I'm aware of.

Q Did you tell this officer to also report her complaint to the District Attorney's Office?

A Yes, I believe I did.

Q What was the nature of the problem that she was complaining about?

A I can't remember what it was.

MR. BROUGHAM: Asked and answered three times.

Q (By Ms. Bisset) Was it sexual?

A I can't remember what it was.

Q You were telling me, earlier, about what it is that you inspect. You say you go to the jail once a month and do an inspection?

A Yes.

Q Tell me the scope of the inspection.

A We do walk-throughs through the whole facility. We go into the monitoring room to make sure that all the cameras are working properly, like I said, see that the generator, backup generator is working properly, ventilation is proper, and that the cells doors close the way

they're supposed to. And that's basically about it. We visit with the [41] officers there, the monitoring officers that watch the inmates, ask them if there's problems or if there's anything that we can do to help.

Q Have you received any informal complaints while you were walking through the jail?

A No, just the temperature is always a problem, not enough air conditioning, stuff like that.

Q To your knowledge, has the Board of County Commissioners done anything to correct conditions in the jail, other than temperature?

A John takes care of the jail, okay? If there's any expenditures that are for repairs, or whatever, that are a big number, he'll generally come to us, and we'll approve them. I don't know that there's been anything that we've denied him.

Q When you had this complaint from Stella Duran and this other deputy whose name you don't recall, did you also share those complaints with the County Attorney?

A I can't remember if we did or not.

Q Was the County Attorney Sheldon – is it Garrett Sheldon?

A Garrett Sheldon, yes.

Q To your knowledge, did he take any action

* * *

[50] with them.

Q What other lawsuits have been filed?

A I know that my son-in-law had a lawsuit against the County.

Q Miguel Duran?

A Yes.

Q What were the charges, do you know?

A No, I don't.

Q And do you know how it was resolved?

A No, I don't.

Q Was it actually filed against the County?

A Yes, I believe it was.

Q Do you know who represented the County?

A No, I don't.

Q Do you know if the County was sued by Deborah Garcia, after she was terminated by Sheriff Salazar?

A I heard something about that, but I have no idea what the results are. I think she was compensated, but I don't know how much, or whatever.

Q To your knowledge, have there been any other lawsuits filed against the County while you've been a County Commissioner?

A Only that I'm aware of, these three.

MS. BISSET: I think that's all the [51] questions I have.

EXAMINATION

BY MR. BROUGHAM:

Q Mr. Montoya, Sheriff John Salazar is an elected official of Huerfano County, Colorado, correct?

A That's right.

Q And you are an elected official of Huerfano County, Colorado?

A Yes, sir.

Q And so is the coroner of Huerfano County an elected official?

A Yes, she is.

Q I believe you've already said this, but as separately elected officers of Huerfano County, I believe it's your understanding that the only control you have over the Sheriff's Office is, essentially, budget?

A Yes, sir.

Q Do you control how much money he gets to run his office?

A That's right.

Q You don't tell him who to hire?

A No, I don't.

Q You don't tell him who to fire?

[52] A No, we don't.

Q As an example, when you were asked, earlier, if you heard about an incident in Pueblo involving Dominick

Gonzales, if that was a personnel incident, that was the Sheriff's issue, and not the Board's issue?

A That's right.

Q In terms of disciplining or reprimanding employees or officers of the Huerfano County Sheriff's Department, that's John Salazar's responsibility, not the Board's?

A Yes, it is.

Q Now, you've also been asked questions about the Board's monthly walk-throughs at the Huerfano County Jail. Is it your understanding that that's a requirement of state law?

A Yes, it is.

Q And when do those walk-throughs typically occur, in relationship to the regular meetings of the Huerfano County Board of County Commissioners?

A Generally, around lunch time or early afternoon.

Q You try to do it on the same day as a regular meeting?

A Yes, on Wednesdays.

[53] Q And after – strike that.

A Can I add one thing, too? They're not scheduled. We don't schedule a lot, we just go at random.

Q So they don't do it on any predictable day, I guess?

A No.

Q Now, it, apparently, is your memory that on the day that Stella Duran came to the Board and said what

she said, after that board meeting, you went over to the Sheriff's Office for one of your regular walk-throughs?

A Yes, sir.

Q And it was during that visit to the Sheriff's Office that you mentioned Stella Duran's comments to Sheriff Salazar?

MS. BISSET: Object to leading nature of these questions. You can answer.

A Yes.

Q (By Mr. Brougham) And the meeting of the Board, on the day that Stella Duran came to the Board, would have had a written agenda, so that people would know what was going to be discussed at the board meeting?

A Yes. Our agenda starts at 10:00 o'clock [54] in the morning.

Q Had Stella arrived before 10:00 o'clock?

A Yes.

Q It's, apparently, the practice of the Board on which you're serving to allow citizens an open hour before the regular meeting, to say things to the Board?

A Yes. They're welcome to come in any time between 9:00 and 10:00 o'clock.

Q And whatever discussions or statements are made to the Board before 10:00 o'clock would not be in the minutes?

A No. We make no decisions before 10:00 o'clock.

Q So in all likelihood, whatever Stella said or didn't say to the Board is not reflected in the Board's minutes?

MS. BISSET: Object to leading question.

A They should not be.

Q (By Mr. Brougham) With respect to what Stella Duran told you, in terms of your memory, was her major concern the fact that she hadn't gotten medical attention?

A I think that was the issue that she [55] started with, that John was not letting whomever give her her medication.

Q Do you know what her problem was, her medical problem?

A No, I don't.

Q And then she mentioned something about sex activities in the jail?

A Yes. Yes, she did.

Q And something general about drug activities in the jail?

A Yes.

Q Do you recall her mentioning any names, in terms of who was involved in either the sex activities or the drug activities?

A I can't remember that she mentioned any names.

Q Do you recall her mentioning any times?

A No.

Q Do you recall her mentioning any incidents of sexual or drug activities?

A No.

Q Did Stella Duran tell you that she was a victim of some sexual activity?

A No, she didn't.

Q When Stella came to the Board and said [56] something about these three subjects, do you know whether she was in jail or out of jail at that time?

A I believe she was out of jail.

Q You had known her for about 15 years before that; is that right?

A Yeah, I believe so.

Q Do you know how many times Stella Duran had been arrested by either the Huerfano County Sheriff's Office or the Walsenburg Police Department?

A No, I don't.

Q Did you know that she had been arrested by those agencies?

A Yes, I did.

Q What is Stella's mother's name?

A Ramona Duran.

Q Do either Stella or Ramona blame the authorities in Huerfano County for the fact that Stella no longer lives in Huerfano County?

A I believe I've heard that comment, yes.

Q In terms of the general things that Stella told the Board on the morning we have talked about today, have you talked with either Commissioner Andreatta or Former Commissioner Sandoval about whether they have any more specific memory of that morning than you do?

[57] A I did talk to Mr. Andreatta, and he told me he couldn't remember anything other than what I had – what I had talked about.

Q Even though you didn't take Stella seriously, as I said, that morning, you did mention it to John Salazar when you were over there?

A Yes, we did.

Q By over there, I mean after the board meeting that day, on your monthly walk-through?

A Yes, that's the only time we talked to him about that.

Q And was that the only thing you talked to John about that morning, or do you recall?

A I believe that was the only thing that we discussed.

Q In terms of whether John Salazar reported back to you after you told him the general things that Stella said, you don't recall that he ever did report back to you?

A I don't – I do not remember him coming and visiting with us on that. He may have, but I just do not remember.

Q Well, in general, as you've said earlier in this deposition, running the jail and the personnel issues are

John Salazar's responsibility [58] and not the Board's; is that correct?

A That's correct.

Q And there wouldn't have been any requirement, I take it, then, from your perception, that John Salazar would have reported back to you after you told him about what Stella said?

A I don't think that was probably necessary that he do that.

Q Once again, he's a separately elected official, and you have no control over what he does or doesn't do about personnel issues?

A That's right.

Q But John Salazar, as the Sheriff of the County, does report to you, periodically, on inmate issues?

A Yes, he does.

Q And that includes such things as how many inmates are in the jail and how much money he needs to run the jail?

A That's correct.

Q You said that's mostly what he talks about?

A Yes.

Q And in terms of reporting on these issues at the jail, if he needs more money, the Board tries [59] to see if you can give it to him?

A That's right.

Q You do not tell him what to do or what not to do about running the jail, other than making suggestions?

A That's all we do is suggest.

Q As you understand it, the operation and running of that jail is John Salazar's responsibility and not the Board's?

MS. BISSET: Objection, leading.

A Yes, sir.

MR. BROUGHAM: No other questions.

FURTHER EXAMINATION

BY MS. BISSET:

Q I have just a couple more. Mr. Montoya, in your opinion, what are the obligations of the County to protect the constitutional rights of inmates staying at the county jail?

MR. BROUGHAM: Objection, involving a legal issue, question of law.

A I believe that's John's responsibility.

Q (By Ms. Bisset) Do you think the County has any responsibility for that?

A I think our responsibility is seeing that he is operating the jail, Sheriff's Department, [60] whatever, in his budget, and he doesn't go over his budget.

Q So it's your opinion, then that the responsibility of the Board of County Commissioners is limited to budget, with respect to the jail?

A That's all we can do is control his budget.

Q You don't think that the Board of County Commissioners has any responsibility with respect to constitutional violations which may occur in the jail?

A Only that the jail is in adequate condition.

MR. BROUGHAM: Again, objection, involving a totally legal issue, question of law.

Q (By Ms. Bisset) Did you invite Ms. Duran to come before the County Commissioners in the official meeting, so that her complaints could be noted on the record?

A I don't believe we did.

Q Is there a reason you didn't?

A Other than, we didn't take it serious enough to – and I don't think that that would – as for publicity, or whatever, I don't think that would be proper.

[61] MR. BROUGHAM: I have an objection to the question, as a matter of law, and what can be brought before the Board if it's an official open records meeting, under Colorado law.

Q (By Ms. Bisset) You wouldn't want it on the record, because of the publicity that might come from –

A Probably not. It's John's – it was a concern that was brought to us that we directed to John.

Q So you avoided having it become part of the minutes so it wouldn't become public knowledge?

A We didn't avoid it from coming in the minutes. She come in, and we accepted her when she come in. We didn't suggest anything else.

MR. BROUGHAM: I object to the form of that question.

Q (By Ms. Bisset) Do you ever include matters that come before you between 9:00 and 10:00 o'clock in the Board of County Commissioners minutes?

A If there's a decision to be made, yes.

MS. BISSET: That's all the questions I have.

(Whereupon, the witness waived signature.)

(The deposition concluded at 10:40 a.m.)

* * *

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 99 S 1967

DEPOSITION OF AMANDA GUEL

DECEMBER 6, 2000

AMANDA GUEL,

Plaintiff,

v

HUERFANO COUNTY BOARD OF
COUNTY COMMISSIONERS,
HUERFANO COUNTY SHERIFF JOHN SALAZAR,
DOMINICK GONZALES, and ROBERT MARTINEZ,

Defendants.

Deposition of AMANDA GUEL, taken by Defendants, at 1200 17th Street, Suite 1700, Denver Colorado, beginning at 2:12 p.m., before Janilynn L. Butler, Shorthand Reporter and Notary Public.

* * *

[17] in Walsenburg; correct?

A. Yes.

Q. Why were you there?

A. I had a warrant out of Texas.

Q. Where were you arrested?

A. In Walsenburg.

Q. By whom?

A. I don't remember his name.

Q. What agency?

A. The sheriff's department.

Q. So you believe you were arrested by a deputy sheriff as opposed to a city policeman?

A. I believe so.

Q. How did you happen to get stopped in Walsenburg?

A. We were going through town to go to court in Dalhart, and we stopped in Walsenburg to stay the night. I went to the sheriff's department to get a motel voucher, because we didn't have money to stay in the motel, and they ran my driver's license and I had a warrant.

Q. Were you working at the time?

A. No.

Q. Was Tim working at that time?

A. No.

[18] Q. You were living in Alamosa?

A. Yes.

Q. Where?

A. In a house next to his mom and dad.

Q. His mom and dad were from the San Luis Valley?

A. Yes.

Q. Did he have family in Dumas, too?

A. No.

Q. How did Tim happen to be in Dumas?

A. He used to work there.

Q. On a ranch?

A. Yes.

Q. How old is Tim?

A. 32.

Q. Has he ever been married before?

A. Yes.

Q. Does he have children?

A. Yes.

Q. By other marriages?

A. Yes.

Q. How many?

A. Three.

Q. Where do they live?

A. Two live with us and one lives in San [19] Antonio.

Q. Texas?

A. Yes.

Q. Was Tim divorced when you first met him?

A. No.

Q. When did Tim get divorced?

A. May of 1999.

Q. What was the warrant out of Texas for?

A. Non-appearance.

Q. Non-appearance on what?

A. On my sentencing date in Dalhart.

Q. You had apparently been charged with a crime sometime before October of 1998, in Dalhart, Texas?

A. Yes.

Q. What was that crime?

A. Credit card abuse.

Q. And you entered a guilty plea or were convicted?

A. I entered a guilty plea.

Q. Felony or misdemeanor?

A. Felony.

Q. Had you ever been charged with any felony before the credit card charge?

[20] A. No.

Q. Had you ever been in jail before you were jailed in Walsenberg in October of '98?

A. Yes.

Q. Where was that?

A. In Dalhart, Texas.

Q. Over the credit card thing?

A. Yes.

Q. How long were you in jail there?

A. Seven days.

Q. And you were then released on bond?

A. Yes.

Q. And entered a guilty plea, I take it, as a result of some kind of plea bargain?

A. Yes.

Q. Did you have a lawyer in Dalhart?

A. Yes.

Q. It was a lawyer you paid for or a public defender?

A. We paid for.

Q. And you were to be sentenced when, give or take?

A. It was October or November of 1996. It was supposed to be in October, and since I didn't make it, they postponed it until November, I think is

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